COMMERCIAL CLASS-BOOKS

MARINE INSURANCE

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MARINE INSURANCE

A HANDBOOK

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BY

WILLIAM GOW

M.A. (Glasg.), Ph.D. (Heid.)

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PREFACE TO FOURTH EDITION

WHEN the Marine Insurance Act of 1906 (6 Edw. VII., Ch. 41) came into operation on the 1st January 1907, it seemed to put an end to any useful existence of the present book, based as it is almost entirely upon Case law, which has been codified or superseded by that Act of Parliament. In consequence, it was arranged that there should be no further reprint of this book, as it seemed no longer adapted to the wants of the commercial community, and the writer felt that, having done its work, it might well be allowed to drop out of existence. But very soon after this decision was reached, an unexpected demand for the book arose, and as it was impossible to meet that demand by immediately supplying a similar work on the Marine Insurance Act of 1906, the only alternative that remained was to reprint the last edition, adding in a supplement the most important decisions reported since 1903. This plan is by no means satisfactory to the writer, except in so far as it gives him the opportunity of completing the record of important decisions given up to the 31st December 1906, that is, up to the close of the period during which marine insurance was regulated principally, if not entirely, by Case law. As it appeared convenient to bring the record of cases as far down as possible, the most important decisions given from 1st January 1907, to the close of

Trinity term 1909, have also been recorded. It is felt that this is a very imperfect way of dealing with the subject, but in the present circumstances, it is practically the only available plan.

WILLIAM GOW

5 Castle Street, Liverpool,
August 1909.

PREFACE TO THIRD EDITION

THE completion of the fifth revision of this handbook leaves me with the impression that if the book had to be entirely rewritten it must assume a structure very different from that now presented. The controversies that were raging when the book was originally planned have either been settled by legal decision or have been pushed aside by other and more pressing matters. In fact, the atmosphere has changed; and strange though it may appear, it seems to be true that even a prosaic text-book of a small section of commercial law takes its spirit and form from the surroundings of its writer, much in the same way as the great imaginative works of literature bear on them the traces of the physical, mental and moral environment of their creators. But what is of perpetual value in the case of genius is only misleading and worthless in all the rest, and therefore in them, particularly in text-books, remodelling and rewriting become necessary. Besides, there appears to be some hope that the long-discussed Marine Insurance Codification Bill may shortly become law. When this comes to pass, there will be a well-defined starting-point, whence new departures will be made in directions probably quite unsuspected by any one at this moment. Till then it is hoped that this little work may continue to be found useful to assured and underwriters alike.

WILLIAM GOW.

UNION MARINE INSURANCE COMPANY, LTD.,
LIVERPOOL, *27th June* 1903.

PREFACE TO SECOND EDITION

At the reprintings of this volume in 1896 and 1897, opportunity was taken to correct such errors as had been discovered, and to add the decisions in the most important cases occurring since the first issue. On the present occasion additions have been made to the text, an attempt has been made to notice all recent decisions, and the appendices have been enlarged, completed, and brought down to date. At the same time the writer has done his best to keep the book from increasing in size, a task by no means easy in view of the ever-expanding material of the subject and the unceasing activity of litigants and judges.

B 1 Liverpool and London Chambers, Liverpool,
15th October 1899.

PREFACE TO FIRST EDITION

AT the close of a course of lectures delivered in the Michaelmas term of 1893 at University College, Liverpool, under the auspices of the Liverpool Board of Legal Studies, I was honoured with several requests for the issue of the lectures in book form. In spite of the existence of such admirable manuals as the late Mr. Richard Lowndes's *Practical Treatise on the Law of Marine Insurance*, and Mr. Charles M'Arthur's *Contract of Marine Insurance*, there seemed to be a want of some smaller and simpler book, adapted for the needs of beginners, and of those desirous of obtaining a general knowledge of the principles and practice of Marine Insurance, rather than a complete criticism of recent decisions on the subject. On consideration of the matter it became clear that if I was to make an attempt to meet this want, the subject must be worked over again by me from the beginning, the forms of expression employed in the lectures being in many cases ill-adapted or quite unsuitable for a book. I have accordingly rewritten the whole work, and have endeavoured to embody in the following pages the results of all important decisions on Marine Insurance up to 1st February 1895. The authorities consulted are given in detail in the list on pages xi. and xii.; unfortunately Mr. Tyser's book did not come into my hands until it was too late to use it.

I venture to indulge in the hope that my experience of insurance in merchants' and shipowners' business may have enabled me to appreciate those wants of the Assured which underwriters are sometimes thought unduly to neglect.

I desire to acknowledge with thanks the permission given to me by Mr. Reginald G. Marsden and his publishers, Messrs. W. Clowes and Sons, Limited, to reproduce some of the documents given in the Appendix; the suggestions made by Mr. T. A. Bellew, Secretary of the Liverpool Underwriters' Association; and the constant assistance of my friend and deputy, Mr. Cyril A. Prescott, who has given me much help in correcting the text and checking the case-references, and has drawn up the Index of Cases. To the unfailing kindness and invaluable advice of another friend I owe if possible even more, but without his permission I cannot take the liberty of placing his name on this page and of so conferring on it a distinction not mine to bestow.

WILLIAM GOW.

F 7 Exchange Buildings, Liverpool,
20th February 1895.

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HISTORICAL INTRODUCTION

In oversea commerce there are four primary or cardinal documents—

(1) The invoice embodying the terms of the contract of sale,
(2) The bill of exchange,
(3) The bill of lading,
(4) The policy of marine insurance.

All four may be and usually are existent in one form or another in every transaction of oversea trade. But all, except perhaps the invoice, involve a third party in addition to the seller (shipper) and buyer (consignee): the bill of exchange involves a banker, the bill of lading a shipowner, the policy of marine insurance an assurer, or, as he is more usually called, an underwriter. Each of these documents becomes in respect of that third party, a separate and distinct contract. Thus the document of marine insurance evidences primarily the contract between the assured (merchant or shipowner) and his underwriter, but it is capable of extension for the protection of any one to whom the assured properly transfers his interest in the contract of insurance, and in the goods or matters to which it refers.

Marine insurance, according to an Act of Parliament of 1601 (43 Elizabeth, c. 12), has existed time out of mind, "by means whereof it cometh to pass that upon the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventure

not than upon those who do adventure; whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely." It originally occupied in oversea commerce a merely subsidiary position; it came in only as the last of the arrangements to be made in connection with any venture at sea. But as the method of conducting oversea trade has altered, so has the contract of marine insurance become increasingly important. When large transactions are worked, as is now extremely common, with credits and margins, the amount of the premium of insurance is often the item that decides whether some venture will be attempted or not. The protection which marine insurance affords is now usually regarded as an absolute necessity to the oversea merchant; and thus by degrees marine insurance has become in one shape or another an integral, almost an essential, factor in oversea commercial transactions.

The origin of marine insurance is lost in obscurity. In the eighteenth century, when it was felt that nothing could be counted respectable unless its descent were traceable from Rome or Athens, great efforts were made to find in Roman literature some evidence of the existence of marine insurance in Republican and in Imperial times. No direct reference has been found either in juridical or in general Roman literature, and the few passages that have been gathered out of historians and orators do not go much beyond saying that in some marine ventures the venturer was in some way secured against loss. The commerce that grew up between Italy and ports of the other Mediterranean lands must have been immense, and there is no doubt that certain provisions of the character of marine law were generally respected in the Levant, being known as the Rhodian Laws. From this name it is gathered that they must have been in vogue between 900 and 700 B.C., in the period of Rhodian prosperity. A provision of Rhodian law is mentioned in Justinian's *Digest* (Book XIV. Tit. 2, § 1), but no reference is made to insurance. In any case, if insurance was practised in the ancient world, we have no direct evidence of it. Indeed no evidence exists

that marine insurance prevailed in any commercial community at or before 1000 A.D. The only Celtic reference of which I am aware is in the *Tale of the Two Young Gentlemen*,[1] and as it deals with a merchant owning three ships trading between Britain and the Indies, it is clear that either the tale dates from about the end of the sixteenth century or that this passage in it has been interpolated after that period. There is also a striking absence of mention of insurance in each and all of the compilations of sea law with which modern European maritime legislation began, whether the compilations be of Romance or of Teutonic origin. This is true of the *Consolato del Mare*, a code originating in Italy or Spain some time in the eleventh or twelfth century; the *Laws of Oleron*, said to be issued by Richard I. of England in 1194, the earliest manuscript dating from 1266; the *Laws of Wisby*, compiled about the close of the thirteenth century; and the much more recent *Hanseatic Laws*, published at Lübeck in 1593 or 1597, and again in revised and enlarged form in 1614. But the silence of these codes on the subject of insurance has been ably explained by Judge Duer. All these laws are "laws of navigation, as distinguished from regulations purely commercial." The *Consolato* is very full in relation to freight and to the duties of master and mariners; the *Laws of Oleron* deal expressly with French ships and French navigation; the *Wisby* and the *Hanseatic Laws* are the work of communities engaged principally in the carrying trade. Consequently it would be unsafe to conclude from their silence about insurance that insurance did not exist at the time of their publication. Although evidence of the exact time and place of the origin of insurance in modern Europe does not remain, there can be no reasonable doubt that its invention or rediscovery occurred in Italy at the close of the twelfth or the beginning of the thirteenth century. The Florentine historian, Villani, who died at an advanced age in 1348, says that when the Jews were expelled by Philip Augustus from France in 1182 they

[1] In MacInnes and Nutt's *Folk and Hero Tales from Argyleshire*, London, 1890.

adopted some system of insurance of their property. What authority he had for this statement does not appear, but the statement itself proves that when Villani wrote insurance was an established practice in North Italy. The Jews either invented it for the occasion or took advantage of an institution already established in North Italy. The Lombard merchants of these days had in their hands all the banking and oversea trade of Europe as far as the Crimea on the east and London and Bruges on the north, and in the early part of the thirteenth century their adoption of the business of remitting money by bills of exchange and of making profit upon loans resulted in the transference to their hands of the trade formerly in possession of the Jews. The Lombard merchants, especially the Genoese, spread all over middle Europe; Lombard bankers, then known as "usurers," established themselves in every country; as Hallam puts it, "the general progress of commerce wore off the bigotry that had obstructed their reception."

If we may draw any conclusion from the recorded failures of English traders to exclude Italians from the carrying trade into England, and from the constant mention in early policies of insurance of "the surest writing or policy of insurance heretofore made in Lombard Street," it must be that marine insurance was brought into our country by the Lombards. From Malyne, an English writer of 1622, we learn that the Antwerp policy in his day contained a similar clause referring to Lombard Street in London, from which it may fairly be concluded that whether it was by Lombards, Englishmen or Flemings that the practice of marine insurance was established in Antwerp, it was established on the model adopted in London.[1] London and Bruges have already been named as places where the Lombards were in force; it is worth noting that they were also two of the principal factories of the great Hansa league, and at these two points of contact the ships and merchants of Italy and

[1] But the earliest known policy in English (*vide* p. 323) refers to Antwerp conditions as recognised in England in 1555.

Spain transferred to the ships and merchants of the Hansa towns such part of their cargoes as were destined for a more northern market; through them oriental produce was transmitted to the furthest parts of the north.

Introduced by these pioneers of commerce, marine insurance took firm root in the different commercial communities of Europe. The firmness of its hold and the reality of its growth can be best seen on consideration of the various ordinances and codes which were compilations in more or less systematic form of the insurance usages that had developed in different commercial centres. The most notable of these are :—

The Ordinances of Barcelona, 1434, 1458, 1461, 1484.
" " Florence, 1523.
" " Burgos, 1538.
" " Bilbao, 1560.

Le Guidon de la Mer, Rouen, between 1556 and 1584, published in 1671 by Cleirac.

The Ordinance of Middelburg, 1600.

The Ordinances of Rotterdam, 1604, 1635, 1655.

Us et Coutumes de la Mer, by Cleirac of Rouen, 1656.

These were followed by what is generally allowed to be one of the most perfect achievements in codification ever accomplished, the production of a genius whose name has been utterly forgotten, the great

Ordonnance de la Marine, 1681.

This work, one of the grand achievements of Louis XIV.'s reign, was undertaken and completed under the direction of his famous minister, Colbert. For English students it has a peculiar interest, for it has been largely instrumental in moulding the English law of marine insurance.[1] In France its authority remained so great that when Napoleon I. issued his codification of French law, great part of Colbert's Ordonnance was assumed into it with but

[1] In this connection one should notice *The Underwriting and Average Regulations of the City of Hamburg*, 1731. Translation published in Lloyd's List of 12, 17, 19 Feb. 1903.

slight alteration, so that in many respects we have a revision and perpetuation of the Ordonnance in the

Code de Commerce of 1807.

On the model of this last have been formed all the modern codes of commercial law (including sea insurance) adopted by the different countries of Continental Europe, *e.g.* the Spanish Commercial Code of 1886, translated into English in 1896 by F. W. Raikes, Q.C. These codes have in their turn been elucidated and more closely defined by judges who have decided cases in accordance with their provisions. The convenience and advantage of a code are not that it makes reference to cases unnecessary, but that it definitely states the law on all points discussed in the code in their proper relation one to another.[1] As Judge Duer observes: "Nearly every written law on a complex subject requires a commentary—a commentary that study, reflection, and experience can alone supply."

Of subsequent local or municipal regulations regarding insurance the most important are the

Hamburg conditions of marine insurance, 1847, revised 1867;

Bremen conditions of marine insurance,

which have been translated into English, the former by the late Dr. E. E. Wendt of London, the latter by Mr. F. Reck of Bremen.

To the list of codes must be added that which was in 1867 described by the late Mr. Justice Willes (in a paper printed in the Report of Unseaworthy Ships Commission, 1874; vol. ii., Appendix, No. lvii.) as "the latest and perhaps best considered one, being the joint production of the lawyers and merchants of North Germany," namely the

North German General Mercantile Code of 1861,

adopted by Prussia in 1862, accepted by the law of 16th April 1871 constituting the German Empire as imperial German law, and now known as the

German General Mercantile Code (*Deutsches Allgemeines Handelsgesetzbuch*),

[1] Cf. Maine's *Ancient Law*, p. 14.

of which Dr. Wendt issued a translation in his work on *Maritime Legislation* (3rd ed., 1888—Appendix).

This code has recently been revised, and we now possess the new

German Maritime Code,

part of the new German General Maritime Law, passed May 1897 to take effect from 1st January 1900. Translated into English by W. Arnold, 1900. Addenda.

Meanwhile matters in England proceeded in a different direction. At present the English-speaking peoples are unique in their failure to compile codes or adapt their legal acquirements and results to that form of expression. There is neither ordinance nor code to refer to, and up to the middle of the eighteenth century there is great dearth of that specially English product, reported judicial decision. In the introduction to his book on *Marine Insurance*, Park says: "I am sure I rather go beyond bounds if I assert that in all our reporters from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance. Even those cases which are reported are such loose notes, mostly of trials at Nisi Prius, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject. From hence it must necessarily follow that as there have been few positive regulations upon insurances, the principles on which they were founded could never have been widely diffused, nor very generally known."

The purpose of the Act of Parliament of 1601 (see p. 1) was the institution of a Court of Policies of Insurance, to consist of an Admiralty Judge, the Recorder of London, two doctors of civil law, two common lawyers and eight merchants, any five of whom were empowered to hear and decide all causes arising in London. But there are no traces of much activity on the part of this court: the restriction of its jurisdiction may partly explain this, but a more serious cause is to be found in the fact that it was decided that an

adverse decision in the court did not prevent the reopening of the whole dispute in a court of common law. By 1720 the Court of Policies of Insurance had fallen entirely into disuse; the place of regular law proceedings being largely taken by arbitration in which the practice of continental countries was cited as authoritative or at least deserving attention, and their ordinances and codes were admitted as evidence of custom and practice. This went on till the days of William Murray, Lord Mansfield, who presided in the Court of King's Bench from 1756 to 1788.

Park, in the introduction to his *Marine Insurance* already quoted, gives a most interesting account of the changes in procedure introduced by Lord Mansfield. These changes were so radical that they almost amounted to a reconstitution of the court. Before his time the whole case "was left generally to the jury without any minute statement from the bench of the principles of law on which insurances were established. . . . Lord Mansfield in his statement of the case to the jury enlarged upon the rules and principles of law, as applicable to that case; and left it to them to make the application of those principles to the facts in evidence before them." Being hampered by few precedents he had a clear field, and his master mind practically created the commercial law of modern England. His decisions and dicta are the foundations of our insurance law, and through the acceptance of them by eminent American judges they lie at the base of the American decisions. He took full advantage of all he could gather from all the continental ordinances and codes existent in his day accepting his legal principles largely from these sources. The practices and customs of trade he learnt from mercantile special jurors, out of whom he gradually trained a body of experts in insurance matters. To them he most carefully expounded the law, and in his judgments he cited foreign authorities freely. For instance, in the case of *Luke* v. *Lyde* (1759, 2 Burr. 883) which dealt with the question of liability for freight due for goods lost at sea, "he cited the Roman Pandects, the Consolato del Mare, laws of Wisby and Oleron, two English and two

foreign mercantile writers, and the French ordinance; and deduced from them the principle which has since been part of the law of England" (Scrutton, *Mercantile Law*, p. 15).

As respects the present position of the law of insurance in England, it may be said that the contract of insurance falls under the general rule of English Contract Law, namely, that the determining element of the intent of the contract is the common intention of the contracting parties. As years have gone on the possibility of diversity of intention and the difficulty of discovering the actual common intention have both been much reduced by the fact that the decided cases have almost all related to one set insurance formula. In fact the ordinary form of policy prevailing in England since about 1613 is very like the Lloyd's policy form of to-day. Consequently we have nearly three hundred years of decision and tradition bearing on one set of words, with the resultant certainty of the range and effect in English law of the words used in the customary form of the contract of marine insurance. A fixed form of policy offers the almost invaluable advantage of securing to both parties a certainty of signification in the terms employed, with the consequent stability desirable in all transactions into which it is introduced as a factor. On the other hand there may be some reason for doubting whether a form that may have been adequate to the commercial wants of the seventeenth century, can fairly be expected to be flexible enough to adapt itself to the wants of the nineteenth or twentieth. Every day instances occur in which merchants, shipowners, and underwriters are driven to most curious expedients in their endeavours to adapt an ancient, not to say antiquated, document to modern needs.

In 1894 Lord Herschell (then Lord Chancellor) introduced into Parliament a codifying bill dealing with Marine Insurance. The bill was submitted to the various commercial bodies whose interests it affects, with the result that a general agreement has in the end been reached on almost every point. The bill has been reintroduced session after session, but so far has not become law. There appears, however, to be a fair prospect that it may be passed by both Houses by the autumn of 1903.

Addenda.

CHAPTER I

ELEMENTARY NOTIONS

Slip, Covering Note, Policy, Stamp Act

Intent of Contract of Marine Insurance.—As the determining element of the intent of a contract is the common intention of the contracting parties, the simplest and surest method of arriving at the true character of the contract of sea insurance is to consider what is the intention common to a merchant or shipowner (or broker acting on his behalf) offering a risk and to an insurer (underwriter) accepting it. It is that the merchant or shipowner (or broker) desires the underwriter to assume in respect of the article which the merchant or shipowner (or broker) desires to insure, the liability for a certain named proportion of such loss or damage as may chance to accrue to it from certain named perils or dangers, and that the underwriter is content to assume this liability in return for a certain agreed sum of money.

Good Faith—Actual Interest.—It is almost self-evident that the transaction is assumed to be undertaken in good faith, and that consequently the merchant or shipowner actually has something which can sustain loss or damage by the dangers arising in the course of navigation.

The transaction described may also be expressed in the following form :—

(1) A Contract of Indemnity,
(2) Made in good faith (*in uberrima fide*),
(3) Referring to a defined proportion,
(4) Of a genuine interest in a named object,
(5) Being against contingencies definitely expressed, to which that object is actually exposed,

(6) And in return for a fixed and determined consideration.[1]

The salient points of the transaction may be briefly put thus: Insurance is a limited aleatory or contingent contract of indemnity.[2]

Assured and Assurer.—The parties to the contract are known as the assured and the assurer, the former of whom is protected by the latter from losses and damage suffered by the property insured in consequence of the perils insured against. The assurer is usually in England named the underwriter, because he subscribes his name to the document of insurance. When a request is made to an underwriter to cover property by insurance, the act is usually expressed by saying that "a risk" has been offered to the underwriter. "Risk" thus comes to mean the liability of an underwriter under his contract. But the word "risk" is also used in a more limited sense to mean a peril or danger insured against, for instance the risk of fire, the risk of jettison, etc. The assured is usually a merchant or a shipowner, and is perhaps best described as a person who has an insurable interest in the property insured. The nature of insurable interest and the various kinds of property, etc., which can be insured will be

[1] Cf. Duer i. 58. "It is a contract of indemnity in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or implied in the policy, during a certain voyage or period of time." Exception might perhaps be taken to the phrase "not exceeding a certain *amount*." Cf. also the Belgian Insurance law of 1874, "L'assurance est un contrat par lequel l'assureur s'oblige, moyennant une prime, à indemniser l'assuré des pertes ou dommages qu'éprouverait celui-ci par suite de certains événements fortuits ou de force majeure."

The second last European code, the Spanish Commercial Code of 1886, avoids the dangers and difficulties of definition by silence, in this respect conforming more to the habit and style of English commercial law than to that which has prevailed in continental commercial legal practice, especially in Latin countries.

[2] Cf. Mr. Justice Patterson in *Irving* v. *Manning*, 1847, "A policy of insurance is not a perfect contract of indemnity." *Vide* p. 70.

discussed hereafter. But the merchant or shipowner need not himself effect the insurance, he may employ some one to do it for him. An agent for this class of business is called an insurance broker, his remuneration consists of a brokerage, being a percentage (usually 5 per cent or 2½ per cent) of the cash paid to the underwriter for covering the risk, which is termed the premium.

Addenda.

Offer and Acceptance of Risk.—A risk may be offered for insurance either orally or in writing; acceptance by the underwriter may also be signified either orally or in writing; if in writing it is usually by the underwriter signing or agreeing to sign a memorandum of the transaction. The insurance regulations of most European countries compel the underwriter to prepare or issue a signed document expressing the contract: this document is known as a policy. But some of these regulations do not make the absence of a policy deprive the assured of the advantage of any arrangement made between him and the underwriter—this holds specially of Belgium. In France the majority of the decisions is said to tend to the view that a policy is essential for the purpose of proving the contract (that is, presumably, its extent and intent), but that it is not essential for the purpose of giving the contract validity. It is hard to see wherein can lie the value of a legally valid contract of whose contents evidence is not forthcoming, unless, indeed, there are elements so essential to certain insurances that the mere existence of the contract of insurance involves the existence of certain terms or conditions in that contract.

English Practice.—The English procedure in the offer and acceptance of a risk is unique. It is usual for the broker to offer risks by means of a shorthand description of the venture in question, called a *slip* (see Appendix A). The underwriter signifies his acceptance of the whole or of a part of the value exposed to peril, by signing or initialling this slip, putting down the amount for which he accepts liability, or by signing and issuing to the assured (whether principal or broker) a similar document made out in his own office called a *covering note* or *insurance note* (see Appendix C). But neither slip nor covering note constitutes

the contract. These documents are merely first sketches of the contract; memoranda intended to serve as the groundwork of the contract in its finally completed form; they are simply *mémoires pour servir*, so incomplete that they can only be explained when taken in conjunction with the contract in its definitively elaborated form.

Slip.—Slips or insurance notes of this kind are in England of no legal value: in the form described they are not admitted in any English court as evidence for anything beyond the date of acceptance of a risk;[1] this being the result of fiscal arrangements which are enforced partly by invalidating all contracts not fulfilling the requirements of the Revenue Department. Still slips and insurance notes are regarded by the insuring public with the most jealous care. They are taken by the parties concerned as fixing the terms of the contract so far as they are expressed in these documents, and any failure to fulfil what was understood to be the agreement would most seriously damage the good name and commercial reputation of the offending party. Slips and covering notes are merely provisional agreements, binding in honour only, to issue a stamped policy on certain terms and conditions on receipt of the necessary information. They cannot be stamped and sued upon as policies.[2]

It is expressly provided by 54 & 55 Vict. c. 39, that no contract or agreement for a sea insurance shall be valid unless the same is expressed in what is termed a policy. There is thus a complete discrepancy between positive statute law and the traditional and actual practice of daily business. This is carried to such an extent that in marine insurance circles the honourable obligation to fulfil to the utmost any contract for which slip or cover has been initialled or signed by an underwriter, is regarded as so binding that

[1] But given in evidence and referred to in judgment of *Laing* v. *Union Marine*, Q.B.D. 10 Apl. 1895, 11 Times L.R. 359; and in *Gardiner* v. *City of London Ufwg Assn.*, and *The Aikshaw*, 9 Times L.R. 605. Addenda.

[2] *Home Insurance Company* v. *Smith* (1898), Mathew, J., in Q.B.D. 14 Times L.R. 366, see p. 24.

it is not expected that any information respecting the risk, arriving subsequent to the acceptance of the risk, need be communicated to him, even though it bear on the nature and character of the risk. The ground of that abstention is that it is not fair to tempt any man to swerve from a course to which he is in honour bound. On the side of the assured a much greater laxity has prevailed. Where the venture contemplated cannot be entered upon, there is evidently reasonable cause for the assured to ask the underwriter to consent to cancel the agreement. But if the venture is entered upon in conditions anything like those contemplated when the agreement in question was made, there should not be a request for cancellation without some extremely strong ground, one which ought not to be in any way dependent on the rate of premium paid as compared with that at which the risk might, or could, be insured elsewhere. There seems, in fact, to be no good ground for holding that the assured on a slip or covering note is not bound in honour equally with the underwriter to complete his contract on the terms arranged, provided the risk in question reaches the commencement specified for it by the parties.

Quotation.—The rate at which an underwriter expresses his willingness to assume liability for a venture is termed a "quotation." Obviously a mere quotation of itself imposes no legal obligation until it has been accepted by, or on behalf of, the assured. Apart from the provisions of the statute to which reference has been made, it is clear that until acceptance there has never been any agreement between underwriter and assured, and consequently that it is open to the underwriter at any time before acceptance to withdraw his quotation. This is in law the case even when the underwriter has given to the assured what in the language of commerce is known as a "firm" offer. It is popularly supposed that such an offer imposes a legal obligation on the part of the person making the offer to keep it open until the person to whom it is made either rejects or accepts it. But in law there is no foundation for such a view unless some "consideration" be given to the underwriter for the undertaking on his part to keep his offer open. Considera-

tion is one of the essentials of a contract according to English law, and may be described generally as "some matter agreed upon as a return or equivalent for the promise made, showing that the promise is not made gratuitously."

Effect of Quotation.—But it does not follow that because a quotation or a firm offer or the initialling of a slip imposes no legal obligation, it does not give rise to an obligation in honour on the part of the underwriter. Different questions arise as to the duties of an underwriter under the code of honour by which he is bound, most of which are by this time settled by usage. It is evident that the complexion of any proposed insurance may be completely altered by the receipt of news. Besides, further information and reflection may cause the underwriter to change his opinion of the conditions and the premium required for the risk proposed. As the offerer has taken away the quotation to consider and remains entirely free of any obligation to accept unless at his own pleasure, it is evidently, on the grounds of ordinary fair dealing, unreasonable to expect that the other party to the proposed agreement, the underwriter, should be placed in a worse position. Besides, it frequently happens that the same business is offered through various hands, without any one knowing definitely through whom it will actually be done. There is no obligation on the underwriter to reserve himself for the first offerer of the risk, although, as a matter of practice, later offerers are often informed that the risk has been shown already. But that is entirely a matter of friendly courtesy. When a broker has reason to expect that the risk will be offered through various hands, or that the rate, if not at once accepted, is likely to be increased, he is accustomed—in case he is on such terms with his principal that his action is sure not to be misunderstood—to accept the rate "subject to approval" (s.a.) and to get the underwriter to sign a slip s.a. This is really changing the quotation into a signed slip for a risk containing the special clause *subject to approval*. Such a slip can be no more valid than any other slip; it is of no *legal* validity, it is only better than a quotation in so far as it is a written document evidencing

the intentions of the parties at the time it was signed. But as a matter of *honour*, it is expected that if an underwriter agrees to the submission of his quotation in this form, he will—for such a time as will permit the broker to receive from his principal a message indicating acceptance or refusal—hold himself ready to go on with the insurance on the terms he named.

Practice in Quotation.—Generally in practice an underwriter may be expected to confirm within reasonable time quotations made to principals or agents (brokers), unless meanwhile exceptional circumstances have arisen, unexpected news has come in, or the underwriter has already undertaken a risk on the venture from another offerer. But that is a matter entirely of *honourable* and not of *legal* obligation.

The following instance of the course adopted by a Marine Insurance Company in connection with a quotation may be of interest and value :—

On 21st August 1888, Messrs. H. of B., Lancashire, wrote to the X. Marine Insurance Company, Liverpool, asking their rate on cotton valued £650 per ship T. D. from P. to Liverpool, due to leave P. about the end of June.

In reply the X. Company wrote on 22nd August on a memorandum form, bearing the full name of the company and the clause "Quotations available for three days only," the following :—"In reply to your enquiry of yesterday we beg to quote as follows : T. D., P. to Liverpool, 65 bales cotton, value £650, 40s. per cent."

On 24th August the X. Company received a letter from Messrs. H. of B. dated from 23rd August, accepting their quotation.

On 23rd August a report appeared in the papers that the T. D. had been lost some time before ; and when on 24th August the X. Company received Messrs. H.'s acceptance of the quotation, they replied that the ship was lost and quite uninsurable.

Messrs. H. answered that they must hold them to their quotation.

The X. Company submitted the matter to eminent

counsel, who advised that the company, having received no consideration to keep the offer open for three days, was at liberty to withdraw the offer any time before acceptance: that not having so withdrawn, the company could not refuse to ratify acceptance if made within three days, even if it reached the company after news of the loss: that in the absence of the three days' clause or other similar clause, the proposed assured would have a reasonable time within which to exercise his option of acceptance or refusal of the quotation, but that such reasonable time would probably not extend beyond the last post of the day on which the offer was received.

On receipt of this opinion the X. Company issued its policy for £650 per T. D. from P. to Liverpool at 40s. per cent and paid the loss.

Warned by this instance of the dangers that may be contained in a clause apparently rendering a quotation unavailable after a named time, but actually making it available for all that time, unless specially retracted, another Liverpool company has adopted the form of quotation note printed in Appendix D, containing the clause "Subject to acceptance by . . . . and no risk until confirmed by us." Under this clause even the payment of a consideration for keeping the quotation open for acceptance till a named time would not legally oblige the underwriter in case of acceptance to issue his policy on the terms named, as there is the special reserve in the clause providing that no risk attaches until the quotation after acceptance by the assured is confirmed by the underwriter.

Without any clause naming a period for which a quotation is available, there appears to be no reason to doubt that—provided no withdrawal of the underwriter's quotation comes in meanwhile—an acceptance posted by the last mail of the day on which the offer is received, is acceptance within a reasonable time.

Policy.—The broker's slip, the underwriter's cover note, or his signed quotation accepted by the intending assured, can be regarded only as a temporary memorandum of the intention of the parties to an insurance: neither of them is

the definitive expression of the contract to insure. That expression is usually found in the shape of what is termed a *policy*. The name is common to all commercial countries, all having adopted it from the Italian *polizza d'assicurazione* (literally, promise of insurance). As the insurer signifies his acceptance of the liabilities detailed in the policy affecting the objects mentioned therein as insured, by subscribing his name to the policy, he is called in English the *underwriter*.

Classes of Policies.—Policies are divided into various classes in accordance with the different kinds of insurances effected by means of them. The most important of these are *voyage policies* and *time* policies, in which property is insured for transit from one point to another, or for a certain period of time.

Interest policies are those in which it is clear from their form and wording that they are intended to cover some real interest in ship, goods, freight, or other matter capable of insurance; while *wager* policies show from their form and wording that they do not require from the assured any proof of reality of interest in what is stated as the subject of insurance.

In *valued* policies, the amount at which the insured object is valued is definitely stated; while in *open* policies there is no such statement, and in case of the value being needed for completing the transaction of insurance, it has to be fixed presumably in accordance with the law or usage of the country in which the insurance is effected, unless there be some stipulation to the contrary in the policy.

Finally, in *named* policies the vessel on which the risk is taken is definitely stated; in *floating* policies there is usually no such limitation, the wording being made wide enough to cover the insured interest by whatever steamer or steamers, ship or ships it may come. The old designation of this kind of insurance was *in quovis*. But it is not rare nowadays to have floating policies limited to certain named fleets or classes of vessels, or to vessels to be approved by the underwriter before being "declared on the policy" as it is termed.

The ordinary form of English policy will be discussed at length hereafter (pp. 27-129).

Stamp.—The Revenue authorities of most European countries have laid marine insurances under special taxes. In England the regulations for this purpose have been until lately of exceptionally complicated character, but matters have been considerably simplified by the latest Act of Parliament dealing with the subject, the Stamp Act, 1891 [54 & 55 Vict. c. 39]. The importance of these regulations lies in the fact that unless they are complied with, no document, however clear the intention of the parties to it, can be considered valid or of use for the purposes of evidence in any court of the United Kingdom except as regards the date of acceptance of a risk. The provisions of the Act and of the schedule are so short that it is worth while giving them in full, as under :—

[54 & 55 Vict.] STAMP ACT 1891 [Ch. 39.]

Policies of Insurance

91. For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

Policies of Sea Insurance

92. (1) For the purposes of this Act the expression "policy of sea insurance" means any insurance (including reinsurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the com-

mencement of the transit to the ultimate destination covered by the insurance. (2) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

93. (1) A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (2) No policy of sea insurance made for time shall be made for any time exceeding twelve months.[1] (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

94. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

95. (1) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say, (*a*) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp, provided that at the time the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover:

(*b*) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been

[1] But see pp. 236, 237, for provisions *re* Continuation Clause in Finance Act of 1901 (1 Edw. VII. ch. 7).

first received in the United Kingdom on payment of the duty only.

(2) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of £100.

96. Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

97. (1) If any person—

(*a*) Becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*b*) Makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*c*) Is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insur-

ance, or whereby the duties may be evaded, he shall for every such offence incur a fine of £100.

(2) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of one hundred pounds, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer.

(3). If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence, in addition to any other fine or penalty to which he may be liable, incur a fine of £100.

[54 & 55 Vict.] SCHEDULE [Ch. 39.]

STAMP ACT 1891

Stamp duties on policies of sea insurance—

(1) Where the premium or consideration does not exceed the rate of 2s. 6d. per cent of the sum insured	£0	0	1
(2) In any other case—			
(*a*) For or upon any voyage—			
In respect of every full sum of £100, and also any fractional part of £100 thereby insured	0	0	3
(*b*) For time—			
In respect of every full sum of £100, and also any fractional part of £100 thereby insured—			

Where the insurance shall be made for any time not exceeding six months	£0 0 3
Where the insurance shall be made for any time exceeding six months and not exceeding twelve months	0 0 6

Particulars of Adventure.—It is clear that the particulars of the adventure, the underwriters and the amounts underwritten, which are by § 93, 3 essential to the validity of a policy of sea insurance, are only what one would expect to find in such a document. They are, in fact, the particulars given in an abbreviated conventional form on the slip already described.

Limit of Time Policy.—The special limitation of policies for time to a period not exceeding twelve months is one which most underwriters have come to regard as a salutary protection against themselves, though it is simply a matter of revenue regulation.

Consideration.—The requirements of English Statute Law for the expression of certain particulars in a policy of sea insurance seem, without doubt, to be based on the requirements of Louis XIV.'s *Ordonnance de la Marine.* The earlier document differed from the later in making no restriction of time policies to a period of twelve months, and in requiring a great number of additional particulars, among them the amount of premium. The absence of this requirement in the English statute is all the more striking because no policy is issued in England or America without some mention of consideration. Still that occurs, not in consequence of any special legislation, but in conformity with the general contract law of England, by which, without consideration, a promise or agreement cannot be construed into a contract valid at law. If such genuine consideration can be proved, no question will be raised regarding its adequacy or reasonableness, it being always provided that the promise or agreement has been made in good faith and between competent parties.

Meaning of "Sea Risk."—In the interpretation of the Stamp Acts dealing with marine insurance the question has arisen, what constitutes a *sea risk?* From examination of the Customs Regulations, and of correspondence with the Board of Inland Revenue, it appears that the Board do not regard as sea risks the following:—risks by canal or risks on navigable rivers or inland lakes not extending to tidal waters. No doubt this decision was come to after consideration of the topography of the United Kingdom and the parts of the Continent of Europe nearest to it; within these limits there is little to say against it. But it is worth remarking that this interpretation leaves all insurances effected in the United Kingdom on the hulls, freights, cargoes, disbursements, etc., of vessels engaged in trade on the vast inland lakes of North America subject to no duty beyond 1d. per policy.

Slip Stamped.—As a slip or an insurance note almost invariably contains the three essentials of a policy prescribed by the Stamp Act (particulars of the venture, names of the underwriters, and the amounts insured), it seems not impossible that a slip or an insurance note, if properly stamped, may become legal evidence of a contract of sea insurance. This question suggested itself to Lowndes (Law of M. I., 2nd ed., p. 73), but only as affecting the case in which it becomes necessary to submit to the penalty for stamping a document after execution; such a case as would arise if, for instance, an underwriter refused to issue a policy covering a risk for which he had signed a slip or insurance note. It has on several occasions been suggested that when no evidence of an agreement to enter into a contract of sea insurance exists except a slip, that evidence may be rendered valid at law by having the slip properly stamped. This suggestion has been disposed of by the decision of Mathew, J., in *Home Marine Insurance Company* v. *Smith* (1898),[1] that the "cover note was not a policy . . . neither was it a contract to issue a policy. It was a contract of insurance binding in honour only."

Addenda.

Practical Difficulties.—The difficulties which occur in

[1] 14 Times L. R. 366.

daily business in connection with the application of the Stamp Act to marine insurance arise not so much from any obscurity in the Act as from the immense variety of circumstances to which it has to be applied. There is also to be considered the diversity of the interests of the assured to whom the stamp is charged; he wishes to have a legally valid document, and yet he has no desire to waste money in unnecessary stamps.

Spoiled or Unused Stamps.—In the Stamp Management Act of 1891 liberal regulations are announced for the recovery of spoiled or unused stamps. Of these, however, it is frequently impossible to avail oneself, owing to the delay probably inseparable from the proper accurate procedure of a public department, and sometimes from the difficulty of tendering absolute proof of the identity of goods insured by error on more than one policy, or perhaps misdescribed in a policy for which another is later substituted.

Correspondence with Board of Inland Revenue.—A useful collection of correspondence between the Board of Inland Revenue and underwriters on matters connected with the interpretation of the Stamp Acts may be found in E. K. Allen's *Stamp Duties on Sea Insurances*. That book appeared before the Act of 1891, which consequently is only dealt with in an addendum issued with the copies published after the Act passed.

Suggestions.—It seems a pity that there should be such difficulty in the correct carrying out of the Stamp Act as regards marine insurances. The amount of revenue brought into the Exchequer is comparatively insignificant,[1] and the period of time within which documents arriving from abroad must be stamped is so restricted that undoubtedly some portion of the tax is irretrievably lost. Neither assured nor assurer desires to evade the duty on any policy to which effect may need to be given in this country; but it often happens that in the ordinary course of business the policy does not come into the hands of the beneficiary in this country till after the period within which the document can be stamped.

[1] Under £200,000 per annum; in 1901-2, £198,517.

All this delay in paying stamp, and consequent occasional loss to the Exchequer, could be avoided if it were made incumbent on the holder of the policy to get it impressed on receipt with a stamp of small value, say 1d. or even 3d. There would be no temptation to evade or delay payment of such a small amount.

Even after the reduction of the stamp on insurances at a premium of 2s. 6d. per cent and under, to 1d., there is a possibility that some insurances are placed abroad, even with the foreign agencies of English companies, to avoid the duty of 3d. per cent. On a premium of 3s. per cent the stamp is one-twelfth of the gross premium. As matters stand now the very finest risks are most severely weighted with the impositions of revenue. Is any other business oppressed with an equally heavy tax? Could not the duties on marine insurances be made the same as those on fire insurances, namely 1d. per policy, irrespective of duration and amount?

Addenda.

CHAPTER II

THE POLICY: PART I

Policy Forms, Common English Policy, The Heading, The Assured, Lost or Not Lost, At and From

As already stated, the usual expression of a contract of sea insurance is a policy. But before proceeding to the consideration of the usual English form of policy it is desirable to premise that even in its fullest form the policy does *not* expressly detail the whole of the contract between assured and underwriter. (Cf. Arnould, M. I. pp. 40, 41, and see below, pp. 132-134, 144.)

Early Italian Forms.—Citing Malyne, an English writer of about 1620, Marshall writing in the period between 1802 and 1823 states that it is most probable that a policy form very similar to what was in use in his day was introduced by the Lombards into England. There is a striking resemblance between the phraseology of the policy form prescribed in the ordinance of Florence of 1523 (printed in Lowndes, Law of M. I., Appendix A, pp. 233, 234) and that of the English policies of the present day.

Earliest English Form.—The earliest English policy known dates from 1555, discovered in the records of the Admiralty Court by Mr. R. G. Marsden (*vide* Appendix B, p. 323). Next in antiquity comes the policy of 1557 on the *Ele* (*vide* p. 322, note). We have also the policy on the *Tiger* of 1613 (*vide* p. 319), of which the original has not been preserved, but a copy, apparently made for some legal purpose, has been found in the Bodleian Library at Oxford, and is reproduced in Appendix B; it is eminently worth comparing, clause for clause, with the form now in use.

English Practice till about 1865.—Up till within the last twenty-five years it appears to have been customary in England to employ only one form of policy, the old common form adopted by Lloyd's on 12th January 1779, as their standard printed policy. This is the form which appears in the schedule to the Sea Insurance Stamp Act of 1795 (35 Geo. III. c. 63). The practice was to use that policy for all interests covered or desired to be covered by a policy of marine insurance. At Lloyd's this still prevails, underwriters inserting whatever further words or clauses may be necessary to adapt the document to the insurance intended. This procedure has called forth expressions of astonishment and disapproval from eminent persons, among them Lord Mansfield in *Simond* v. *Boydell*, 1779,[1] and Lord Esher, M.R., in *Baring* v. *Marine Insurance Company* on appeal, 1894,[2] and in *Hydarnes Steamship Company* v. *Indemnity Marine Insurance Company, Limited*,[3] when the Court proceeded "to construe the policy in a businesslike way so as to give it a sensible meaning" (*v.* p. 130).

Modern English Practice.—But in the last twenty-five years many marine insurance companies have adopted the plan of keeping in stock skeleton forms of policy, adapted from the common form to suit the requirements of different subjects of insurance, such as ship for voyage, ship for time, freight; and for goods several forms varying according to the conditions on which the goods are meant to be insured. This system offers two practical advantages: it removes from the policy on any interest all clauses that do not affect that interest, and it reduces to a minimum the risk of error in the somewhat mechanical work of writing out policies and affixing the proper marginal clauses.

Lloyd's Form.—The common form of Lloyd's policy being the stem form of all British marine policies, the discussion of its contents will enable us to deal with what are practically the conditions of the great majority of British insurances. The text is as follows:—

[1] 1 Douglas 268.
[2] 10 Times Law Reports 276.
[3] Court Appeal 16 Jan. 1895, 11 Times L.R. 173.

Be it known that A. B. *and/or as Agent,*

S.G.

£

as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause himself and them and every of them, to be insured, lost or not lost, at and from

upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the

whereof is master, under God, for this present voyage,
or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, *as above.*

upon the said ship, etc., *as above,*
and shall so continue and endure, during her abode there, upon the said ship, etc.; and further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever, shall be arrived at, *as above,*

upon the said ship, etc., until she hath moored at anchor
in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever
without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at *as at foot,*

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have

or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, etc., or any part thereof; and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is expressly declared and agreed that no acts of insurer or insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured
at and after the rate of

IN WITNESS whereof, we the assurers have subscribed our names and sums assured in *London*.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent, unless general, or the ship be stranded, *sunk, or burnt*.

Detailed Explanation of Lloyd's Form.—As all current English policy forms have been developed from this one, which has been the subject of manifold discussions and innumerable decisions of the law-courts of the country, it seems advisable to discuss it section by section, so as to obtain, if possible, firm ground from which to consider on what principles it and similar documents are interpreted by the courts, and on what theoretical basis the contract of marine insurance is deemed to be founded. A policy in the above form is technically known as a *clean policy*.

The Heading

The meaning of the letters S.G. is uncertain; probably they stand, as has been suggested, for *Ship Goods*. If

that is so, it is hardly clear why the third great maritime interest, Freight, is not also represented. But it will be discovered later that until 1749 no printed policy form contained the word *freight*, so that if these letters occur on earlier policies, the explanation suggested may be correct. Another view is that S.G. stands for *Salutis Gratia*, *i.e.* for the sake of safety; or *Somma Grande*, *i.e.* total amount (insured), as suggested by Dr. James Gow of Westminster.

The pious heading, "In the Name of God, Amen," which prevailed in all the early French and English policies and in most of the early Italian, is still retained by some English companies. Lloyd's about 1870 adopted instead the formula, "Be it known that," which, however, is merely a recurrence, conscious or unconscious, to the Florentine wording of 1523, *Sia noto e manifesto.*

The Assured

A. B. *and/or as agents*, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance and cause himself and them and every of them to be insured.

By 28 Geo. III. c. 56, it is enacted that

It shall not be lawful for any person or persons to make or effect or cause to be made or effected, any policy or policies of assurance upon any ship or ships, vessel or vessels, or upon any goods, merchandises, effects, or other property whatsoever, without first inserting or causing to be inserted, in such policy or policies of assurance the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof first inserting or causing to be inserted in such policy or policies of assurance the name or names or the usual stile and firm of dealing of the consignor or consignors, consignee or consignees of the goods, merchandises, effects, or property so to be insured; or the name or names, or the usual stile and firm of dealing of the person or persons residing in Great Britain who shall receive the order for and effect such policy or policies of assurance, or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy or policies of assurance.

The penalty for not complying with the requirements of this Act is the nullity and avoidance of the policy.

It is to be observed that the words "and/or as agents" are a recent addition to the text of the policy; they are evidently intended to mean "as principals and/or as agents." Sometimes in their place is found the phrase "on behalf of whom it may concern." These two phrases appear merely to be brief modern forms of expression, covering, if anything, more than the content of the long phrase following. The words of that phrase are so wide that they admit to the benefit of any insurance, which has been from the beginning legally and properly effected, all parties who have in whole or in part, at the time of the insurance or thereafter, such an interest in the subject insured as the original assured had. They even admit to the benefit of an insurance such persons as may be willing to ratify *ex post facto* (*i.e.* after the effecting thereof) an insurance done as it were speculatively, in the hope that when these persons are advised of the insurance they will avail themselves of it.

The words of the policy taken literally demand that the subject insured "doth, may, or shall appertain" to the person assured; in other words, property in the subject insured is regarded as the only interest entitling a person to insure it. But there is one class of persons whose interest of this character does not entitle them to the indemnity afforded by a policy of marine insurance, namely alien enemies. This is simply a matter of public policy. The result is that in time of war no property belonging to a foreigner of a nation carrying on hostilities against England can be legally protected by an English policy.

As there are other persons besides those defined in 28 Geo. III. c. 56, quoted above, who may be and often are interested in an insurance, so there are other interests besides property, in goods, etc., which it is found desirable to cover by insurance. Consequently it has become the recognised practice to comply with the statute quoted, by naming in the policy some real person actually benefited by the insurance, or acting as agent for some beneficiary,

and to extend the protection to cover real interests, though of a less complete and manifest nature than actual ownership of a material object. Such are rights to obtain possession of objects at the close of a marine venture, or to obtain certain payments in respect of their delivery at destination, or to have the disposal of objects arrived at destination, in such a way that some profit or commission accrues to the disposer. Similarly, an insurance may be arranged to take effect regarding even more distant derivatives of property, such as liabilities arising out of ownership, *e.g.* to afford protection against these, or protection against loss by marine peril of lien arising out of liabilities of ownership. All persons exposed to loss in respect of any such interest, excepting alien enemies, are entitled to be assured and to have the benefit of marine insurance. The nature and character of such possession, rights, and liabilities as will entitle their proprietor to effect an insurance will form the subject of a later section entitled "Insurable Interest" (pp. 76-86).

Lost or not Lost

It has been suggested that this clause was first introduced into the policy to meet the case of what are known as *missing ships*, that is ships acknowledged at the time they are insured, to be so long at sea unheard of, that their safety is doubtful. It does not appear in the Florentine form of 1523. But as it is found in the English policy of 1613,[1] it is rather more likely that it was devised for the protection of merchants against such losses as might occur to their ships or cargoes after starting on cross or homeward voyages from foreign ports. It is evident that in the conditions of trade in the sixteenth century, insurances of such voyages must frequently have been effected when there was no means of knowing whether the vessel had sailed or not, and almost certainly none of knowing whether at the moment of effecting the insurance the ship was in safety or not. But by 1613 the clause was used

[1] See Appendix B.

also in London policies on outward voyages commencing in London.

The clause must be understood to be part of a contract of indemnity made in absolute good faith. If the merchant or shipowner knows that when he offers the risk his cargo or vessel is lost, he knows that he is not at that moment in possession of anything connected with the risk whose loss will further damnify him, and that nothing then exists against loss of which the underwriter can indemnify him. Similarly, if the underwriter knows that the venture proposed for insurance has safely arrived at the time of the proposal, he knows that there are no perils to be run against which he can give insurance. Consequently, in spite of the absolute wording *lost or not lost*, the underwriter does not propose to pay a loss known to the assured but not to himself, nor the assured to pay premium for the insurance of a risk known by the underwriter, but not by himself, to have run off safely. The effect of the clause is therefore to secure to the assured the insurance, and to the underwriter the premium on all lawful risks, in whatever position of safety or peril they may be at the time the insurance is made, so long as both parties are in a state of equal knowledge or equal ignorance. There is nothing to prevent an underwriter from accepting an insurance on some matter or object that both he and the assured know, when the risk is submitted, has met with some disaster or even total loss. This occasionally occurs in practice, underwriters accepting insurances after news of a disaster. The courts have upheld such insurances (*Mead* v. *Davison*, 1835).[1] As regards the position of the assured in case the underwriter concealed his knowledge of the safe arrival of a risk offered to him for insurance, Lord Mansfield said (*Carter* v. *Boehm*, 1766):[2] "The policy would be void against the underwriter if he concealed as having insured a ship which he privately knew to be arrived, and an action would lie to recover the premium."

In the case of floating policies underwriters frequently receive together notice of interest declared and of disaster

[1] 3 A. & E. 303. [2] 3 Burr. 1906.

occurred: and the validity of declarations made in such circumstances has also been upheld by the courts (*Gledstanes* v. *Royal Exchange*, 1864).[1]

Marshall (p. 339) considers that though this clause may not be inserted in the policy yet it must in many cases be necessarily implied in the contract, and Arnould (p. 21) reports that if both assured and underwriter were equally ignorant of a loss at the time an insurance was effected, the policy would be, in Mr. Justice Story's opinion, binding without the words *lost or not lost.* As all English forms now contain the clause, and many if not all of the American contain it, this point is not now likely to arise, but it is worth notice that Mr. Justice Story's view is different from that expressed by Mr. Justice Park. Park says (p. 33): "It is the general practice to insure *lost or not lost*, which is certainly very hazardous, because if the ship or goods be lost at the time of the insurance, still the underwriter, provided there be no fraud, is liable. The premium," he continues, "is however in proportion depending upon the circumstances stated to show the probability or improbability of the ship's safety. These words *lost or not lost* are peculiar to *English* policies, not being inserted in the policies of foreign nations." The statements contained in the two last sentences may have been exact in 1817; nowadays the peril in question is accepted without any consideration of its being an extraordinary risk. But it is true that the form *lost or not lost* is peculiar to English and American policies. Still in the French *Code de Commerce* (§ 367) provision is made that in case of insurances effected *sur bonnes ou mauvaises nouvelles* (on good or bad news) the contract is not void unless it is proved that before the signature of the contract either the assured knew of the loss or the underwriter of the arrival. The penalty for such fraud is the payment to the offended by the offending party of double premium and thereafter the criminal (correctional) prosecution of the offender. The German form is similar, *auf gute oder schlechte Nachricht* (on good or bad news). The German General

[1] 34 L.J. Q.B. 30, 35.

Maritime Code provides in § 785 that "the validity of the insurance contract is not affected by the question whether at the time of its conclusion there is no longer any possibility of a claim occurring for damage, or whether claimable damage has already occurred. The contract, however, is invalid as an insurance contract if both contracting parties were aware of the position of affairs. If the underwriter alone was aware that the possibility of a claimable damage no longer existed, or if the assured alone was aware that claimable damage had already occurred, the contract is not binding upon the party to whom the position of affairs was not known. In the second case, the underwriter is entitled to the full premium, even when he establishes the invalidity of the contract." The important point of difference between English and German law is in the treatment of cases in which both parties are aware that the risk has either run off or resulted in some disaster; English law upholds the contract, German law annuls it.

Insurances *lost or not lost* are expressly permitted by the Commercial Codes of Holland, Spain, and Portugal.

At and From

In the blank following these words is inserted the description of the voyage intended to be insured. The formula *at and from* is one of considerable antiquity in England, and was adopted in the statutory form of policy for private underwriters appended to the Act of Parliament of 1795 (35 Geo. III. c. 63): its very existence implies that it is intended to include more than would be covered by the word *from*.

Phillips (§ 927) distinguishes as follows: "Under a policy on a vessel against sea perils 'at' a place as distinct from a voyage, the risk commences when the vessel is at the place in reasonable safety: and on the goods from the time of their being exposed to sea perils within the conditions of the policy in respect of the vehicle and custody in which they are."

Arnould (p. 23) completes the distinction thus: "An

insurance expressed in the policy to be *from A to B* only protects the subject insured from the moment of the ship's sailing from A: an insurance AT *and from* protects the subject insured from the first moment of the ship's arrival at A, and during her whole stay there." This seems too wide an extension, unless it is understood that the subject insured is the ship herself or something on board her when she arrives at A.

The formula *at and from* was likely first devised to meet the case of goods laden abroad on a homeward voyage, but being perfectly adaptable to any kind of risk or voyage became part of the general form of policy.

The voyage for which any subject is insured is described by the mention of its starting and finishing points, known technically as the *terminus a quo* and the *terminus ad quem*. It is notorious that the course of the passage between two named points may not be and ordinarily is not exactly the same in any two cases. But there is in every case a customary manner in which the passage is made; *e.g.* the customary passage which a steamer makes from the United Kingdom to Calcutta, or *vice versâ*, is through the Suez Canal, the customary passage of a sailer between the same points being round the Cape of Good Hope. The course at sea of a vessel, especially of a sailing vessel, necessarily varies in accordance with season, weather, political circumstances, disposition of hostile forces, etc., so that the description of the voyage insured must be regarded as compatible with such necessary variation. Consequently the law considers the voyage insured (*viaggium*, from the more classical *viaticum*) named in the policy to be a course at sea from the starting point (*terminus a quo*) to the finishing point (*terminus ad quem*) in a course of navigation prescribed by custom (*iter viaggii*) with which the passage of the ship (*iter navis*) must correspond. Speaking generally, the course at sea between any two ports is ordinarily the sea-path over which the one can be reached from the other in the shortest time consistent with the safety and ordinary convenience of the things and persons involved in the venture, the special

circumstances of each case being fairly considered. Lord Mansfield speaks (*Thellusson* v. *Staples*, 1780[1]) of proceeding "to her port of delivery in a mathematical line, if it were possible."

In case of insurances *from* a port, and of such as have their commencement determined by the time of *sailing from* a port, it becomes important to determine exactly what constitutes such sailing. In giving the Privy Council's decision of a case arising out of the collision of the *City of Cambridge*, and the *Birmah*, 1874,[2] the bench cited with approval the following from Chief Baron Pollock's judgment in *Rodriguez* v. *Melhuish*, 1854:[3] "If the vessel had all her cargo on board, and the master ready to get on board, and she had everything ready to commence her voyage forthwith, and left her berth with that intention, it might no doubt be said she was proceeding to sea from the time she first left her berth." In *Sea Insurance Company* v. *Blogg*, Mr. Justice Mathew remarked that there was "no authority for the proposition that there could be a *sailing*, as required by the policy, without a clear intention on the part of the master to proceed directly on his voyage."[4] The Court of Appeal in affirming this judgment held that the date of a ship "sailing" within the meaning of a marine policy is not the day she moves from the wharf to an anchorage in the river with the object of keeping the crew on board, but the day on which she actually proceeds on her voyage.[5]

The moment of the commencement of an *at and from* risk under a homeward policy on ship from a foreign port has been determined by the decision in *Haughton* v. *Empire Marine Insurance Company*, 1866.[6] The insurance ran "at and from Havana to Greenock." The vessel arrived on her outward voyage within the headlands of the port of Havana, and was towed under the direction of a pilot by a steam tug up the harbour to an anchorage. Before she had cast anchor, she settled down on the anchor of another

[1] 1 Dougl. 366. [2] L.R. 5 P.C. 451. [3] L.J. Ex. 26.
[4] Commercial Court, 5 Nov. 1897, 14 Times L.R. 20.
[5] C.A. (1898) 2 Q.B. 398. [6] L.R. 1 Ex. 206.

ship and sustained serious damage. Next day she was towed off, taken to another part of the harbour, and discharged. The underwriters on the homeward voyage contended that their policy had not attached when the accident occurred. The court held that it had attached, on the ground that the vessel was plainly *at* the place ordinarily known as Havana when the casualty befell her, and that the risk under the homeward policy attached the moment she entered within the limits of the port in a state of sufficient seaworthiness. At the same time it was agreed that the outward policies had not expired, but they and the homeward policies were regarded as contracts entirely separate and independent, without influence on one another, without reference to one another. To prevent such an overlapping of policies, underwriters usually employ a clause making mention of the expiry of previous policies as a precedent in some way essential to the attaching of those meant to succeed. There are various forms of this clause; the one which best expresses the intention is, "The risk not to attach before the expiry of previous policies."

In *Haughton* v. *Empire Marine Insurance Company*, 1866,[1] the wide geographical range given to "Havana" shows that a considerable freedom is allowed in the interpretation of geographical terms. In documents of marine insurance geographical terms are taken to be intended in their ordinary mercantile sense, that in which business men trading in or with the places named use their names. This mercantile sense must in case of doubt be ascertained from mercantile evidence. As the result of such evidence it has been held (*Uhde* v. *Walters*, about 1811[2]) that the Gulf of Finland is in the mercantile world considered to be part of the Baltic Sea, and (*Robertson* v. *Clarke*, 1824[3]) that in commercial language Mauritius is included among the Indian Islands. In a more recent case (*Royal Exchange* v. *Tod and others*, 1892[4]) it was decided by Mr. Justice Romer that goods loaded on

[1] L.R. 1 Ex. 206.
[2] 3 Camp. 16.
[3] 1 Bing. 445.
[4] 8 Times Law Reports 669.

board a steamer at a port on the Pacific Coast of Central America are not covered by a policy on goods "from the Pacific" by steamers, which so far as was known by underwriters at the place of insurance had not loaded at any port outside the limits of South America before the voyage on which the loss occurred. The judge was satisfied that when the slip was signed neither party contemplated any risk except on vessels sailing from South American west coast ports. Similar difficulty may arise in the use of the apparently unambiguous words *Europe*, *Continent* (*e.g.* in the phrase "U.K. Cont."), *United States* (frequently in the language of some trades restricted to the Atlantic seaboard); in the inclusion of *Aden* under East Indian ports, of *Algiers* under French Mediterranean ports. The difficulty in these is to reconcile mercantile custom and geographical description.

As the geographical description of a port may be found, when tested by commercial usage, to be inadequate or too comprehensive, similarly the official description may fail. The port of Runcorn is for custom-house purposes within the limits of the port or custom-house district of Liverpool. Consequently, as far as revenue is concerned, a ship loading both at Runcorn and at Liverpool is loaded entirely in the port of Liverpool. But as regards marine insurance it has been decided (*Brown* v. *Tayleur*, 1835;[1] *Harrower* v. *Hutchinson*, 1869[2]) that a policy covering a vessel from "a port of loading in the U.K." does not cover a ship partly loaded at Liverpool and partly at Runcorn. Each of these places is regarded as one port, separate and distinct from the other. It is only in a matter of official arrangement and convenience that they are regarded as one; by commercial usage they are not one place.

An insurance *at and from* a named port will not cover a vessel or cargo during a period of undue and unreasonable delay at that port. The transit between the termini is, for the ship, regarded as the aim and object of its existence, and the stay at one of the termini is only justifiable in so far as it is necessary for the undertaking of the passage.

[1] 4 A. & E. 241. [2] L.R. 4 Q.B. 523 & 5 Q.B. 584.

Consequently idle delay at the port of commencement of the voyage will discharge the underwriter (Tindal, C. J., in *Mount* v. *Larkins*, 1831).[1] But if the delay is caused by genuine preparations for the voyage, such as necessary or desirable repairs, etc., the risk continues covered (*Motteux* v. *London Assurance*, 1739).[2] Similarly, for goods, the object of loading them on the vessel being their conveyance to the other terminus of the voyage, the vessel must not be regarded as nothing more than a mere floating warehouse; she is not that, but a vehicle or transport whose essential function is to carry from one port to another. In *Hamilton* v. *Shedden*, 1837,[3] where a vessel engaged in the palm oil trade, with permission to act as a tender to other vessels in the same employ, was detained over twelve months in the Benin River, the delay was held to be unreasonable. Thus, whenever delay is unreasonable in length, or is due to causes not connected with the completion of the voyage, it is held to alter the voyage in a way not in the contemplation of the underwriter; just as much as if after starting on the voyage the vessel turned aside, intending all the time to complete the voyage after doing something else; the delay and the turning aside are both classed as *deviations*.

Similarly, in the course of the whole voyage due diligence to complete the venture must be observed. Undue delay on the voyage, and more particularly at port of call and before discharge at port of discharge, will alter the character of the voyage as respects both ship and cargo.

A closer definition of the beginning and end of the venture as respects ship as well as goods occurs later in the policy and will be discussed in its proper place. Meanwhile there is no doubt that the policy was originally intended to cover only marine risks; all additions and adaptations intended to extend its operation to cover land risks are essentially modern, and do some sort of violence to the general sense of the document. But the reasonable wants of business have had to be met. An inland manufacturer's goods practically pass from his control when

[1] 8 Bing. 108. [2] 1 Atk. 545. [3] 3 M. & W. 49.

once they are loaded on the railway trucks at his siding; a merchant's, when they are passed over to the railway or other carrier. On the Continent of Europe where railway, canal, lake, and river transit form by far the most important part of the carrying done, the wants of the merchant have been met by the institution of companies for the insurance of such risks as their goods are exposed to, or by the special authorisation of marine insurance companies to extend their operations to cover such risks. As a natural consequence special forms of policy have been devised for such business. In England, on the other hand, the smallness of the country and the nearness of the great producing districts to the seaports, reduce the inland risk to such comparative insignificance that it has hardly ever been thought worth while to define its extent and content with any exactness. Such uncertainty has sometimes been found awkward.

CHAPTER III

THE POLICY: PART I—*continued*

Common English Policy continued, General Description of Subject Matter Insured, Duration of Risk on Goods and Ship, including Touch and Stay and Deviation Clauses.

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the . . .

The earliest form of marine policy seems to have been devised for the insurance of goods only, but the extension of protection to shipowners had become usual long before the date when the text of the ordinary English policy was fixed. That text was therefore so drawn as to be applicable both to goods and ship. The way in which this has been done is to make the standing printed text cover both, and to designate in writing at the foot the particular object intended to be covered by the policy.

(*a*) **Goods and Merchandises.**—If the written designation of cargo is not more explicit than these general words, or if either of these words is merely repeated at the foot, the underwriter is held to have willingly acquiesced in the loose description, and to have taken his chance of the nature of the cargo. There are only two points which he can open in such a case; he can demand satisfactory proof that the assured has an actual property in the interest insured, and he can insist that the goods or merchandises be carried in the place properly belonging to them, namely

under deck. As regards the former point, Lord Mansfield in *Glover* v. *Black*, 1763,[1] decided that when a ship and cargo were lost by fire, the plaintiff having lent the captain cash, for which a respondentia bond[2] in common form was given, could not recover the amount of the loan upon a policy on goods. Lord Mansfield based his decision solely on practice; his words were: "In practice bottomry and respondentia have always been considered as a particular species of insurance, and have taken a particular denomination. . . . The ground of our determination is that by the custom of merchants, respondentia is insured under a special denomination. But we by no means say that under an insurance on goods at large a man may not be permitted to give in evidence a mortgage or other special lien."

On the second point, as long as maritime custom has determined that the proper place to carry goods and merchandises is under deck, it results that wares insured in these general terms are taken to be so laden. Consequently, even in cases where the custom of trade permits the carriage of deck loads, articles insured merely as goods or merchandise, or in such terms that their nature is not disclosed, are taken to be laden under deck, unless special mention is made to the contrary. The effect of such special mention is that the underwriter is warned of the special perils of the venture in question[3] (see *Gould* v. *Oliver*, 1840;[4] Lord Addenda. Lyndhurst in *Blackett* v. *Royal Exchange*, 1832).[5]

Further, the words "goods and merchandises" plainly denote such material objects as are bought and sold in trade and are conveyed from one port to another for the

[1] 3 Burr. 1394.

[2] A bond pledging cargo for the repayment on arrival at destination of money borrowed at an intermediate port in emergency, the money not being repayable in case of loss of the venture; the rate of interest charged is always high.

[3] On the other hand the mere description of the wares insured has been held to be sufficient notice to the underwriter that they are carried on deck; for instance, in an insurance on carboys of vitriol it was held to be sufficient that they were carefully stowed on deck; this being the usual place for this article there was no need to inform the underwriter (*Da Costa* v. *Edmonds*, 1815).

[4] 4 Bing. N.C. 134; 2 M. & G. 208. [5] 2 C. & J. 250.

purposes of trade. They do not therefore include effects of the master or spare outfit of the ship. These interests should be defined by name; so also should live stock and their feed.

There seems to be now no reason to doubt that even valuables such as gold and silver specie may be insured under the general words "goods or merchandises." But such valuable documents as bonds and titles appear to be of an essentially different character; there is in the material of which they consist no intrinsic value corresponding to that present in gold and silver. In *Glover* v. *Black*, 1763,[1] Lord Mansfield had in view, when he spoke of mortgage or other special lien, some security of that character affecting objects exposed to marine perils in the venture named.

Cargo on board a vessel is not covered by a policy on the vessel, even though the cargo may be of the same nature as part of the apparel or other furniture of the ship. For instance, if a ship carries as part of its cargo a shipment of ropes and cables belonging to the shipowner, and intended to be used eventually as rigging, a loss of these could not be claimed on the ground that they were part of the ship's tackle; and this even though in case of uncontrollable circumstances (*vis major*, *force majeure*, *höhere Gewalt*) they might have been used to supplement or replace the ship's stores.

(*b*) The *ship* is described in terms more appropriate to the fleets of last century than to the trading transports of to-day. Nothing is to be made of a consideration of what each separate word of the description was intended to cover. Phillips (§ 463) interprets the purport of the clause thus:—"It is well settled that a policy for a commercial voyage on a vessel generally, without any further specification, covers not only the body, but also the rigging, sails, tackle, boat, armament, and provisions, and all the appurtenances necessary, suitable, or usual, and that may be presumed to belong to a vessel of such description, for the purposes of navigation on a voyage such as that

[1] 3 Burr. 1394.

described." This exposition is more immediately applicable to sailing vessels than to steamers, and even in the case of sailers, special exception must be made of fishing vessels. But if for "rigging, sails," we read "engines, boilers, shafting, fuel," the rest of the description will answer all wants. It is to be understood that of the "appurtenances necessary, suitable, or usual," only those which are permanent are to be considered part of the ship, temporary fittings being classed with such articles as sand ballast and dunnage wood and not regarded as being part of the structure of the vessel.

In the case of fishing craft, the decision in *Hoskins* v. *Pickersgill*, 1783,[1] was that "by the usage of trade the meaning of the word *furniture* did not include fishing stores, in the construction applied to a policy of insurance."

On the wording of this clause in the policy the most important decision is that in *Blackett* v. *Royal Exchange*, 1832.[2] In this case Lord Lyndhurst refused to admit evidence of a usage or custom that underwriters never paid for boats slung on the quarter outside the ship. He held that as the boat was included *nominatim* in the policy he ought not to admit evidence at direct variance with the terms of the policy and in plain opposition to the language it used.

The phrase "ship or vessel" is employed to get over a somewhat technical difficulty. The English language possesses no word equivalent to the French *navire*, German *Fahrzeug*, Scandinavian *Fartyg*, meaning any seagoing carrying craft: the English *vessel* has a wider sense, being applicable to any moveable hollow structure capable of containing solids, fluids, or gases.[3] The word *ship* had therefore to be brought in; but it is much too definite, being the technical name of a square-rigged three-master. If *transport* were not exclusively used in a specially limited sense it would be suitable for this place; *craft* would be better still, if it were not generally used to designate smaller boats.

[1] 3 Dougl. 222. [2] 2 C. & J. 250.

[3] Cf. *Whitton Gas Float*, No. 2, 1895, 12 Times L.R. 109.

The phrase "good ship or vessel" is common to charter-parties, bills of lading, and policies of marine insurance. The charter-party after thus describing the vessel proceeds to speak of her being "tight, staunch, strong, and in every way fitted for the voyage." Without reading every detail of this into the word *good* as used in the policy, one may still say that *good* is more than merely ornamental: it is the mark of the underwriter's exemption from liability for risks on notoriously unfit vessels, the index of what is known technically as the warranty of seaworthiness.

Whereof is master, under God, for this present voyage . . . or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called.

As there are many craft of one and the same name, the policy provides for more minute definition by stating, or giving the chance of stating, the master's name. This is a rough expedient, probably the only one possible at a time before the existence of official signals and registry numbers. The two leading cases connected with the misnaming of a ship are *Le Mesurier* v. *Vaughan*, 1805,[1] in which a broker instructed to insure goods on board "*The President*" and to describe her as an American ship, actually did insure goods on board "the American ship *President*," the variation was held to be of no moment, the identity of the ship being proved; and *Hall* v. *Molyneux*, 1744,[2] in which the *Leopard* was insured in error instead of the *Leonard* and the variation again was held to be of no moment, the identity of the vessel being proved by the master's name.

The provision for naming the master is common to most European policies, but except the English policy none states so fully the apparently contradictory clause "or whosoever else shall go for master." Marshall, in 1823, writes (p. 322): "The name of the master also should be specified, because his character and ability are material subjects of consideration in estimating the risk." But if the

[1] 6 East 382. [2] *Ibid.* 385.

fact of the master being one particular man — say one specially acquainted with the trade or voyage in which the vessel is engaged—influences an underwriter's estimate of a risk, it is hardly reasonable to follow the clause naming this master by one dispensing with him. It seems more reasonable to view the clause as merely one of further definition of the ship, be her name and her master's name what they may. As a matter of modern practice, not one policy in ten thousand contains the master's name, consequently special mention of a master nowadays has a much greater significance than it had say sixty years ago. It is therefore likely that the mention of a particular master having charge of a vessel on a named voyage would be binding on the assured in spite of the second part of the clause, unless the substitution of a new master after the completion of an insurance arises from such unavoidable causes as incapacity of the original master through sickness or his resignation after commencement of the venture. As Marshall says the shipowner must not change the master "wantonly or unnecessarily; much less ought he to name one when he means to employ another" (p. 323).

Beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, *as above* . . . upon the said ship, etc., *as above* . . . and shall so continue and endure during her abode there, upon the said ship, etc.; and further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever, shall be arrived at, *as above* . . . upon the said ship, etc., until she hath moored at anchor in good safety, and upon the goods and merchandises until the same be there discharged and safely landed.

This section of the policy is by no means clear in its construction; it is unsatisfactory in its arrangement whatever way it be read. It contains a description of the commencement of the risk mentioning first goods and then ship; it proceeds with an account of the continuation of the risk at the point of its commencement without making any separate mention of ship or goods; it ends with a definition of the close of the risk, dealing first with ship and then with goods.

The wording of the section given above is that of the Act of 1795, and is actually in daily use at Lloyd's and in companies' policies. But a very slight variation given by Arnould (p. 17) in what he gives as the common printed form of policy on ship and goods, helps materially to clear away the difficulty of the section. Where the form in the Act of Parliament of 1795 gives "and so shall continue and endure during her abode there, upon the said ship, etc.," Arnould reads "and so shall continue and endure during her abode there on the said ship, etc." The variation as given by Arnould points to the application of the clause in question to goods on board a vessel, while the 1795 form seems to indicate that the subject of insurance intended is "the said ship, etc.," which is the phrase regularly employed in that form to designate what we now term the hull and materials of a vessel insured. If Arnould's version be adopted and the section be rearranged by taking ship before goods in the description of the inception of the risk, the whole becomes clear, working out thus :—

I. Beginning the adventure—
  (*a*) Upon the said ship, etc., *as above* (*i.e.* at and from the *terminus a quo*).
  (*b*) Upon the said goods and merchandises from the loading thereof aboard the said ship *as above* (*i.e.* at the *terminus a quo*), and shall so continue and endure during her abode there on the said ship, etc.

II. And further, until the said ship with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever, shall be arrived at, *as above* (the *terminus ad quem*).
  (*a*) Upon the said ship, etc., until she hath moored at anchor in good safety.
  (*b*) And upon the said goods and merchandises until the same be there discharged and safely landed.

The sole objection to this arrangement is that it makes

the "etc." after ship at the end of I.(*b*) superfluous. The only alternative is to take the "continuing and enduring" clause to apply both to ship and goods, and to do that a sense must be given to "ship, etc.," in that position which it certainly has not in any of the other places where it occurs.

The discussion of the effect of this clause naturally falls thus—

Commencement of the risk on ship.
" " on goods.
Continuation of the risk.
Close of the risk on ship
" " on goods.

1. *Commencement of the Risk on Ship*

In the discussion of *at and from* it was mentioned that in the case of a policy on ship *at and from* any port the risk attaches the moment the ship enters within the limits of the named port in a state of sufficient seaworthiness (*Haughton* v. *Empire Marine Insurance Company*, 1866).[1] In the case cited it was held that the homeward policies attached although the outward policies had not expired. It has consequently been found necessary that there shall not be two sets of policies in force at the same time, and also that the insured vessel shall not be left uncovered for any time between the lapse of the earlier policies and the attachment of the later. To ensure this, clauses have been added to the policy either of positive or negative form: *e.g.* "risk to commence on expiry of previous policies," or "risk not to commence before expiry of previous policies." The former clause makes any policy in which it is inserted depend absolutely and entirely on the terms of other policies for the determination of its commencement; the latter provides that the other policies shall run out their full existence before the new policy attaches; the former clause adopts the terms of preceding policies by inclusion; the latter does it by exclusion.

[1] L.R. 1 Ex. 206.

2. *Commencement of the Risk on Cargo*

When the carrying vessel is loaded alongside a quay, pier or jetty, the words in the policy are sufficiently definite, and it may be taken that as soon as the goods are in the ship and free of the loading tackle, the risk on the goods commences. But if vessels are loaded in the stream or in the roads, there is a substantial risk between shore and ship for covering which no provision exists in the text of the policy. It does not matter whether loading in the stream or roads is customary and usual at the port of loading or is only occasional, resulting from some special circumstances or necessities of the case, the printed text of the policy does not cover the stretch between shore and ship. For the proper protection of the cargo owner a clause is put in the margin "including all risk of craft while loading," which alters the point of commencement of the risk from loading on board the ship to loading on board the barge or craft destined to carry the goods from shore to ship. But it is to be observed that this clause is inoperative in the case of goods bought f.o.b. (free on board). Any risk or accident occurring to such goods prior to delivery on board the vessel is at the risk of the seller and of his underwriters, the goods not being in any sense the property of the buyer until actually on board the sea-going ship, and consequently not making the intermediate transit at the risk of the buyer or of his underwriters.[1] In the case of goods, which are the assured's property when they leave the shore, being conveyed by a common lighterman (who is answerable for all losses not arising from the act of God or of the Queen's enemies) to the ship, the assured may take recourse either against his underwriter or his lighterman. If he chooses the former then he is bound to give him the benefit of his rights against the latter. There is usually no hardship to the lighterman in this, as he is accustomed as an ordinary matter of business to in-

Addenda

[1] In the case of goods bought *free alongside*, the property passes when the goods are laid alongside the ship at quay or brought alongside the ship in craft where the loading is effected in stream or roads.

sure his liability with underwriters. Such cases constantly happen in connection with cargoes lightered in the Thames.

The policy form is not adapted to cover an interest in goods commencing at a point other than the point of original loading. For instance, in *Spitta* v. *Woodman*, 1810,[1] goods insured on this form of policy from Gothenburg to port or ports of discharge in the Baltic were held never to have been covered, because the goods in question were not loaded in Gothenburg, but in London. In *Langhorn* v. *Hardy*, 1812,[2] the decision was the same, although it appeared that the underwriter knew that the goods had been loaded at London, Lord Mansfield observing that "the Court could not make the construction of a written instrument depend upon the knowledge which the defendant might possess of facts." In *Gladstone* v. *Clay*, 1813,[3] the Court dealt with a policy on a cargo for a homeward voyage "at and from Pernambuco to Maranham, and at and from thence to Liverpool, beginning the adventure on the said goods from the loading thereof on board the said ship *wheresoever*," and held that this wording protected goods loaded at Liverpool, and still on board after the ship left Pernambuco, not having found a market there. Trading voyages of the kind contemplated in this decision are by no means usual in modern business. In the African trade difficulties of a similar kind arise, as the vessels engaged in it after discharging their outward cargo load homeward cargo at each port as they go along in their voyage. In *Rickman* v. *Carstairs*, 1833,[4] the Court decided an action on a policy on ship and goods for a homeward voyage from the coast of Africa to a port in the United Kingdom, beginning the risk on the goods "from the loading thereof on board the said ship twenty-four hours after her arrival on the coast of Africa," Lord Denman holding that without distinct words to the contrary inserted in the policy it could not attach to *outward* cargo, remaining on board the vessel twenty-four hours after her arrival on the coast of Africa. In his judgment Lord Denman admitted that probably the assured had intended

Addenda.

[1] 2 Taunt. 416.
[2] 4 Taunt. 628.
[3] 1 M. & Sel. 418.
[4] 5 B. & Ad. 651.

both outward and homeward cargo to be insured by this policy, but he added a most important remark: "Unfortunately they have used words which will not, we think, effectuate that intention. The question in this and other cases of the construction of written instruments is *not what was the intention of the parties, but what is the meaning of the words they have used?*" To meet the requirements of this dictum it has become usual to insert in African trading policies a clause such as "outward cargo to be deemed homeward interest twenty-four hours after the vessel's arrival at her first port of discharge," or "the outward cargo to be deemed homeward interest in this policy until bartered, sold, or exchanged."

3. *Continuation of the Risk*

As has already been pointed out under "at and from," the risk on ship and goods once commenced at the starting-point of the voyage remains in force while the venture remains there, but only so long as the intention of completing the intended voyage lasts, and the delay at the starting-point arises from causes connected with the voyage and its object. Consequently a ship and goods insured on voyage policies at and from A. to B. containing this clause respecting the continuance and endurance of the risk at A., cease to be covered at it by these policies as soon as the intention of proceeding to B. is abandoned. They similarly cease to be covered should the vessel perform an intermediate voyage, or engage in any service not essentially connected with the voyage for which she has been insured, or be delayed by wilful and unnecessary waste of time.

4. *Close of the Risk on Ship*

There does not at first sight appear to be any reason why the risk shall continue until the said ship *with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever*, shall be arrived at destination. But the idea underlying this formula is probably that the only

arrival which involves an immediate and complete discharge of the underwriters is one in which the whole venture arrives at the intended destination without either diminution or deterioration ; and that consequently any arrival in less perfect condition does not release the underwriter. The mention of ship and goods, as if they were insured together, is merely the accidental result of drawing one policy form to cover all kinds of interest. The moment of arrival *at* a port being, as has been seen in *Haughton* v. *Empire Marine*, 1866,[1] possibly reached a long time and space before the vessel reaches the place where she is intended to lie or discharge, the policy defines the moment of the close of the risk on ship by a reference to the moment of the vessel's "mooring at anchor in good safety." The policy of 1795 extends the ship underwriter's liability to twenty-four hours after arrival of the vessel in good safety. But it was found in practice awkward for shipowners to have outward policies expire so soon as twenty-four hours after an arrival of which they might have no advice. Consequently, when the Stamp Act of 1884 permitted the extension of voyage policies for thirty days after arrival without extra stamp duty, shipowners began to ask for the inclusion of the thirty days in their voyage policies. Cases arose in which vessels insured for thirty days after arrival began, before the expiry of the thirty days, new voyages, for which they were separately insured. It became difficult to determine the proper incidence of loss and damage: underwriters finding themselves sometimes held liable under the absolute thirty days clause for ventures which they did not wittingly assume (cf. *Gambles* v. *Ocean Marine of Bombay*, 1876,[2] on a policy with a fifteen days clause, held to be a time policy added to a voyage policy). In 1885 Liverpool underwriters made a move for the adoption of a uniform clause, which would prevent the overlapping of policies and the consequent difficulties of adjustment. The form of clause proposed by the writer was adopted: "Moored at anchor in good safety at her above-named place of destination, and while there until expiry of thirty days after arrival, or until sailing on next voyage, which-

Addenda.

[1] L.R. 1 Ex. 206. [2] 1 Ex. Div. 141.

ever may first occur." Sometimes the words "however employed" are added after "while there." In the case of a vessel destined to only one port, Mr. Justice Mathew decided that "it was idle to insert the words *however employed*, which seemed to imply other employment than mere discharge."[1] The only point that requires further examination in this clause is the effect of the words "good safety." They cannot mean "absolute security," for there would be no object in extending a contract of indemnity against perils to include a period of absolute security. They do mean the safety necessary to a vessel for the discharge of her inward cargo and the carrying out of the ordinary business of a ship at the port of destination. The arrival of a vessel in the Mersey in tow as a wreck, and her mooring in the Sloyne, did not constitute an arrival in good safety (*Shaw* v. *Felton*, 1801).[2] The leading modern case on the words is that of the *Charlemagne* (*Lidgett* v. *Secretan*, 1870).[3] In this case the vessel insured from London to Calcutta and thirty days with the clause "until she hath moored twenty-four hours in good safety," struck a bank at the mouth of the Hooghly, and was only kept afloat by constant pumping. She arrived thus at Calcutta on 28th October, and was moored. After discharge of her cargo she was on 12th November moved to dry dock, where on 5th December she was destroyed by fire. The destruction by fire occurred on the thirty-eighth day after mooring at Calcutta. The Court held that the policy had terminated before the loss, the vessel having been kept afloat for over twenty-four hours after arrival, and was moored at the usual place for discharge of cargo, remaining all the while in the possession and control of her owners: and she had remained a ship, and in her owner's possession for over thirty days thereafter.

It is to be observed that in the case of the *Charlemagne* the policy ran for twenty-four hours and thirty days after arrival. The Stamp Act of 1884 cited above does not

[1] *The Talavera*, 1897 (*Crocker* v. *General Ins. Co. Ld.*), 13 Times L.R. 96; confirmed by Court of Appeal, 14 Times L.R. 113.

[2] 2 East 109. [3] L.R. 5 C.P. 190; 6 C.P. 616.

provide for covering more than thirty days without payment of extra stamp duty, so that in most modern policies there is no twenty-four hours clause.

5. *Close of the Risk on Goods*

By the terms of the policy goods and merchandises are covered until the same be "discharged and safely landed" at the *terminus ad quem*. When discharge is effected at a quay, wharf, pier, or jetty, alongside which the carrying vessel lies, the risk thus defined does not extend beyond the time when the goods are free of the unloading tackles and rest on the ground or in the place or vehicle in which they are meant to be put immediately on discharge. If goods are not discharged from the ship on to a quay, pier, etc., but into a barge or lighter, then the moment of discharge from the ship is not simultaneous with that of safe landing, as safe landing implies delivery at the customary place for bringing goods ashore (Phillips, § 971, quoting the American case *Gracie* v. *Marine Insurance Company*). The question of liability for the lighterage risk came before the courts in *Hurry* v. *Royal Exchange*, 1801,[1] on a policy on hemp from St. Petersburg to London, which was landed, according to the constant practice of merchants in the Russian trade, in public lighters. It was decided that if it is the custom of the trade to land goods by lighters or launches, the goods are during such supplemental transport covered by a policy of insurance containing the words "until safely landed." But there are limits to this general proposition. If, for example, cargo be discharged from a vessel into craft, that cargo is not covered under the policy during delays not necessarily connected with the voyage which is insured, such as would be, for instance, incurred by awaiting transhipment to a vessel bound on an outward voyage (*Houlder* v. *Merchants Marine*, 1886).[2] In the case of *Hurry* v. *Royal Exchange*, 1801,[1] the lighters employed were common public lighters. Similarly in the earlier case,

[1] 2 B. & P. 430. [2] 17 Q.B.D. 354.

Rucker v. *London Assurance*, 1784.[1] In both cases goods were insured to London till discharged and safely landed; in both the goods were discharged into public lighters, and were damaged between ship and shore; in both cases the loss was held to be recoverable under the policies. In his decision of the latter case, Mr. Justice Buller said: "If a merchant will not send public lighters, it shall be a delivery to him when the goods are put on board his own lighter." This is a statement of the decision of judge and jury in *Sparrow* v. *Carruthers*, 1745,[2] Lord Chief Justice Lee holding the underwriter discharged. In modern commerce these decisions are of value at such ports as Malta, Port Saïd, Busreh, and perhaps at some ports in Asia Minor and Syria. The ground of the decision is that the consignee goes out of his way to anticipate the customary course of trade at his port by his own act, voluntarily assuming charge of his property earlier than he need do. Any damage or loss between ship and shore is thus done to goods under the consignee's control; and it is a principle of law that no one shall profit by his own misdeed or misfortune.[3]

Again, if the assured's property in goods ceases before their safe landing (if, for instance, they are sold on such terms that they become the buyer's property as soon as the ship carrying them reaches her destination), then unless the terms of sale include the transfer of the insurance, the assured cannot transfer to a third party any insurance between ship and shore which he may have effected; he cannot, for the advantage of a third party, claim from his underwriter indemnity for any loss or damage occurring after the expiry of his interest in the goods.

To meet cases in which goods are for convenience discharged into lighter or other craft, although such discharge is not the ordinary custom of the port, an expansion of the craft clause already given in section 2 (p. 51) has been devised. In some cargo policy forms there is now found the clause, "Including all risk of craft to and from the vessel." And in *Paul* v. *Insurance Co. of North America*[3]

[1] 2 B. & P. 432, notes. [2] 2 Str. 1236.
[3] The Elton, : Q.B.D. 9 Aug. 1899.

this clause has been held by Mr. Justice Mathew to cover risk of craft in a lighter of the owner of the goods.

It is worth noting that in many cases (*e.g.* West Coast of South America) freight on goods is due as soon as the goods are delivered to the lighter into which they are discharged. As will be seen in the discussion of particular average, this fact has an important bearing on the indemnity payable in case of goods damaged in lighter between ship and shore.

And it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any port or places whatsoever . . . without prejudice to this insurance.

This paragraph of the policy is based on the provision of the Florentine policy of 1523, which permits "the ship to touch at any other place, and to navigate forwards or backwards, to the right or the left at the captain's pleasure, and to do all his requirements." Where this kind of liberty is given in the earliest English policies it is usually limited, *e.g.* "to touch and stay at any ports and places on this side Zante, as well on the Barbary as the Christian shore"; from which it may be concluded that the vessel was not expected to touch and stay anywhere in her voyage from London before reaching the Mediterranean. But the modern English form introduces the words "in this voyage," which control the whole of the rest of the clause; the word "voyage" being used here not as equivalent to the passage of the ship, whatever that may happen to be, but in its close technical sense of the course of navigation prescribed by custom between the termini named. This view was most unmistakably expressed by Lord Mansfield in *Lavabre* v. *Wilson*, 1779;[1] Park (p. 86) and Marshall (p. 187) agree in their statement of his clearly intimated opinion "that these general words were, by the expressions *outward and homeward bound voyages*, and *in this voyage*, qualified and restrained so as to mean only places *in the usual course of the voyage* to and from the places mentioned in the policy." This view has been maintained strictly by succeeding judges.

[1] 1 Dougl. 284.

In *Hogg* v. *Horner*, 1797,[1] a ship was insured at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatsoever. The ship sailed from Lisbon to Faro to complete her loading, Faro being a port in Portugal, to the southward of Lisbon, and therefore quite out of the course of the voyage to England. Lord Kenyon held that the liberty given by the policy to call at any one port of Portugal must be restrained to a permission to call at some port to the north of Lisbon, in the course of the voyage to England, and that going to the southward was a deviation.[2] Similarly in *Labinovitch* v. *Pacific Fire and Marine*, 1887,[3] Mr. Justice Smith held that a policy covering iron on the voyage Antwerp to Odessa, did not cover iron from Antwerp to Constantinople, and thence *viâ* Batoum and Nicolaieff to Odessa. This case is somewhat complicated by the words in the policy "all liberties as per bills of lading," which it was decided must be taken as referring to the bills of lading for the particular goods insured by the policy.[4]

Further, the liberty to touch and stay is limited by its close application to the main object of the voyage ; it cannot be availed of except for matters essentially connected with the voyage ; in other words, the option cannot be exercised outside the limits of the venture described in the policy. The master is free to turn off this prescribed course of his voyage in case of extraordinary emergency, or to avoid threatened disaster or capture or other peril insured against, all without prejudice to the insurance. To use the language

[1] Park 444, 475 ; Marshall 184.

[2] It would be difficult to know how to apply Lord Kenyon's test in the following case of a steamer's actual voyage : "At and from Kotka (Finland) and/or Snarven (Xiania) to Bushire and/or Bussorah ; with leave to call at Barrow-in-Furness, and/or Manchester and/or any other ports or places *en route* (including Jeddah) for any purpose whatsoever."

[3] Queen's Bench, 28 Feb. 1887.

[4] See *Laing* v. *Union Marine*, Q.B.D. 1895, 11 Times L.R. 359, in which a policy "from Haiphong to any ports or places in any order in Japan, with leave to call at any ports or places in or out of the customary route in any order and for all purposes," was held NOT to cover a vessel from Haiphong to Hongay, and thence with coal to Hongkong, and thence to Japan.

of Lord Mansfield in *Pelly* v. *Royal Exchange*, 1787:[1] "Is this like a deviation? No: 'tis *ex justa causa* which always excuses." In the same judgment the following exposition of the liberty to touch and stay, granted by the custom of certain trades, occurs: "The insurer . . . must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen, and in contemplation at the time he engaged, he took the risk upon a supposition that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed. The usage being foreseen, is rather allowed to be done, than what is left to the master's discretion, upon unforeseeh events, yet if the master *ex justa causa* go out of the way, the insurance continues." No doubt the saving of life would be held to justify touching and staying out of the customary course, and certainly putting in in consequence of, or for the repair of, damage arising from peril insured against. On the other hand, a ship insured from London to Berbice was held to have deviated when she put in to Madeira to unload goods and take in wine (*Williams* v. *Shee*, 1813, before Lord Ellenborough).[2] Also a vessel insured from Parà to New York, with leave not only to call but to discharge, exchange, and embark cargo at all or any of the Windward or Leeward Islands, was held to deviate when after sailing from Parà on her passage to New York she put in to St. Thomas and St. Bartholomew's in order to obtain information for the owner of the state of the markets there, in order to enable him to decide about another proposed venture in another vessel of his and that one sailing *from* New York (*Hammond* v. *Reed*, 1820).[3] In neither of these cases was the touching and staying accomplished for an object connected with the venture on which the insurance was effected.

Still less is the assured covered by this clause if, instead of going on the voyage named in the policy, the vessel

[1] 1 Burr. 341. [2] 3 Camp. 469. [3] 4 B. & Ald. 72.

undertakes an absolutely different voyage. For instance, goods insured from Liverpool to Melbourne loaded on board a vessel sailing from Liverpool to Sydney are never at any moment of the passage covered; and a loss even on this side of the Cape at a point within that part of the passage common to both voyages cannot be recovered under the policy. In the eye of the law the voyages are absolutely and entirely different.

To prevent hardship to cargo-owners who may have their policies invalidated through deviation or change of voyage over which they have no control, there has been added to the policy on goods a clause to the following effect:—

> In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

The clause has in some cases been added to ship policies also, with less necessity, but not unfairly perhaps as regards insurances from a foreign port. Even on outward voyages the shipowner may have some claim for protection against his policies being rendered valueless by a whim of the captain or by a piece of ignorance on his part which does not take effect until after he has passed from the immediate control of the owner. But here again the whole contract is controlled by the primary condition of perfect good faith between assured and underwriter.

The effect of the "change of voyage" clause on floating policies on cargo has lately been determined in the case of *Simon Israel and Company* v. *Sedgwick and others* (before Mr. Justice Wright in Q.B.D., 23rd July 1892; confirmed in Court of Appeal by Lords Justices Lindley, Bowen, and A. L. Smith, on 9th November 1892).[1] The action was brought on a policy of insurance on merchandise, "as interest may appear or be hereinafter declared: at and from the Mersey or London to any port in Portugal or Spain this side of Gibraltar, and thence by any inland conveyances to any

[1] 8 Times Law Reports 726.

place in the interior of Spain or Portugal, including all risks whatever from the time of leaving the warehouse in the United Kingdom, and all risks of every kind until safely delivered at the warehouses of the consignee, with liberty to touch and stay at any ports or places whatsoever for any purpose necessary or otherwise." There was a marginal note in these terms. "Deviation $^{\text{and}}/_{\text{or}}$ change of voyage $^{\text{and}}/_{\text{or}}$ transhipment not included in the policy to be held covered at a premium to be arranged." The goods in question were on or before 2nd March 1892 despatched from Leeds to Madrid. On former occasions goods of the same shipper for Madrid were shipped at Liverpool for Seville and carried thence by land to Madrid. On 3rd March the shipper declared these goods on his policy: on 7th March he learnt that the goods would go by the *Lope de Vega*$_s$: on 10th March he caused that vessel's name to be inserted in the declaration, and intending the same course to be observed with those goods as with former shipments to Madrid, he instructed the insurance broker that the voyage was to Seville. The vessel had left Liverpool on 6th March and was lost on that part of the voyage, common to vessels bound for the Atlantic ports of Spain and those for the Mediterranean ports. It was then discovered that the *Lope de Vega*$_s$ was not going to Seville at all, but only to Carril and Huelva on the west coast of Spain, and to Carthagena and other ports on the east coast; and that the bill of lading for these goods had been made out for Carthagena. The shipper informed the underwriter of his mistake, tendered the customary extra premium for Carthagena, which was refused, solely on the ground that the voyage to Carthagena was not covered by the policy. Without the deviation or change of voyage clause there could have been no question on this point; but the assured, relying on that clause in their policy, contended that when the goods left the warehouse, being intended by the shippers to proceed by a route covered by the policy, the declaration was rightly made and the policy attached; and further, that the assured were entitled to change the voyage in terms of

the clause, and on paying a proper extra premium for Carthagena, the amount of which was not in dispute. The underwriters contended that the words "change of voyage" in the clause apply only to a change after the policy has once attached by the commencement of a voyage of such a kind that, if not changed, it would have been within the policy, that a shipment of goods and an initial declaration of insurance on any other voyage is outside the policy, and that therefore the "change of voyage" never takes effect at all in such a case. Mr. Justice Wright's decision in favour of the underwriters was confirmed by the Court of Appeal. The law therefore now stands (in absence of reverse of the Court of Appeal's judgment by the House of Lords, to which as far as is known this case is not intended to proceed) that the deviation or change of voyage clause in a floating policy on merchandise is restricted to apply only when the policy has attached by the commencement of a voyage which, if not changed, would be within the policy.

There does not appear to be anything in the decision limiting the application of the principle to open policies only; it seems to bear the wider general application that the words "a changed voyage" are not equivalent to the words a "different voyage"; the former did at one period attach to the policy, while the latter did not at any period attach.

CHAPTER IV

THE POLICY: PART I—*continued*

Common English Policy continued, Valuation

The said ship, etc., goods and merchandises, etc., for as much as concerns the assured, by agreement between the assured and the assurers in this policy, are and shall be valued at £ . . . .

English law does not impose any obligation on assured or underwriter to fill up the blank at the end of this clause with any sum. Policies consequently fall into two classes —(1) *open*, in which no value is given; and (2) *valued*, in which a value is given.

The earliest Italian and English policies make no statement of the value of the goods or vessel insured; at the most they provide that a certain proportion, usually 10 per cent of the value, shall remain uninsured, stated to be "at the assured's adventure." This provision was embodied in the *Guidon de la Mer*, and it was stipulated in the *Ordinance of Louis XIV.* (Tit. vi. Art. 18) that the assured should always bear the risk of the tenth of the goods which they shipped, unless there was an express declaration on the policy that they meant the whole value to be insured. The French *Code de Commerce* of 1807 did not reproduce this restriction, which had fallen into disuse, express declaration of complete insurance having become usual.

In consideration of the subject of valuations it soon becomes apparent that some regard must be had to the intention of the contract of insurance. The aim of the

contract being to secure indemnity to the assured, indemnity should be the limitation of the obligations of the underwriter. As Lord Mansfield put it in *Godin* v. *London Assurance*, 1758: "Before the introduction of wagering policies it was upon principles of convenience, very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only in case of a loss, and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud, lest the temptation of gain should occasion unfair and wilful losses." But the application of this principle is not easy. What constitutes indemnity in case of loss to a merchant engaged in oversea trade? He conducts certain commercial operations, acting on his knowledge of foreign markets and his skill in estimating the course of trade. If he ships goods and loses them by marine perils, whether is he indemnified by recovery from his marine underwriters of the sum he paid for these goods plus all the shipping expenses or of the sum which, but for the perils of the sea, he would have obtained for them at destination? It is evident that all the impetus would be removed from trade if the merchant had at the commencement of a venture no expectation of obtaining more at the end than he expended at the beginning. Therefore there is considerable reason for asserting that any repayment for lost goods which leaves the assured in a worse plight than he would be if the venture had been completed is an imperfect indemnity. The first person who drew public attention to the ambiguity of the word "indemnity" was Wilhelm Benecke of Hamburg, who published between 1805 and 1821 his great *System of Marine Insurance and Bottomry*.[1] Removing to London about 1814 or 1815, he published in 1824 his *Treatise on the Principles of Indemnity in Marine Insurance, Bottomry, and Respondentia*. Benecke concluded that to secure perfect indemnity the merchant must word his valuation thus: "Valued at so much as the gross proceeds of the goods specified will be at the port of discharge,"

[1] 2nd edition, edited and rearranged by Vincent Nolte. 2 vols. Hamburg, 1851 and 1852.

stipulating specially whether the duty-paid price or the price in bond is intended. As a merchant would hardly ever be able to determine exactly what price his goods would fetch at destination, he would need for his own protection to insure an amount in excess of his expectation, and to reduce this at the close of the venture by declaring a short interest and getting a return of premium. Then, from the nature of this method of valuation, it is plain that it will not act fairly between assured and underwriter, unless the goods insured are such that the market to which they are shipped is neither raised by their loss nor depressed by their arrival; in other words, it is hardly applicable except "in the conveyance of current merchandise to and from important commercial places" (Benecke, p. 12). A middle course between the somewhat elaborate and inconvenient system proposed by Benecke, and the stricter ancient system of permitting the merchant to insure nothing beyond the cost of his shipment, is often adopted, namely, the valuing of the goods at invoice cost and an agreed percentage, which may be taken to represent out-of-pocket expenses and anticipated profit. The adoption of such a system simplifies the matter immensely, but it involves the abandonment of the idea of indemnity in either sense, and if the assured covers the whole sum of his valuation he is left either under-insured or over-insured as the market at destination goes up or down. It has, however, become the almost universal practice in England to use *valued* policies for goods and ships, while of freight policies a considerable proportion is *open*.

1. Open policies. Between 1760 and 1825 various cases went to the courts; we are consequently in possession of a series of decisions by Lord Mansfield and his successors on the valuations attached by English law to different interests. As might be expected, from the date of the earliest of this series of decisions, they are based on practices founded on the theory and jurisprudence of the French system of maritime and commercial law. As French legislators before that period based their work on such maxims of Roman law as *Nemo debet aliena jactura*

locupletari (no one ought to be profited by another's loss), it is only to be expected that these decisions will leave the merchant indemnified only to the extent of this actual cost and shipping expenses of his goods. The decisions are that in an open policy the valuations attached to different interests are:

(*a*) Goods or merchandise: the prime cost (say invoice cost) plus shipping expenses and cost of insurance (*Lewis* v. *Rucker*, 1761).[1]

(*b*) Ship: the value at the commencement of the voyage, including the outfit, stores and provisions for crew, advances made against crew's wages and cost of insurance (Marshall, p. 633:[2] Stevens on *Average*, 5th ed. p. 190).

(*c*) Freight: the gross freight due to the ship on her arrival abroad plus cost of insurance (*Palmer* v. *Blackburn*, 1822).[3]

(*d*) Other objects of insurance: the value to the assured at the commencement of the voyage plus cost of insurance.

On examination of these four classes of interests, it is evident that owners of cargo (*a*) and parties interested in whatever may fall under class (*d*) get under these decisions the very barest provision that can be termed indemnity. On the other hand, by the provisions of (*b*) and (*c*), a shipowner using open policies would be permitted by law to be in a better position through losing his ship at sea than by having her complete her voyage in safety, the difference being the cost of the outfit, stores, provisions, advances, in fact nearly all the expenses of earning the freight, and, in addition, the cost of insurance of ship and freight. The state of the law is thus an inducement both to assured on

[1] 2 Burr. 1167.

[2] "A ship is valued at the sum she is worth at the time she sails on the voyage insured, including the expenses of repairs, the value of the furniture, provisions and stores, the money advanced to the sailors, and, in general, every expense of the outfit, to which is added the premium of insurance."

[3] 1 Bing. 61.

goods and to underwriters on ship and freight not to use open policies, and indeed they are now but rarely used.

2. Valued policies. The advantages and limitations of the system of valued policies were well set forth by Mr. Justice Willes in *Lidgett* v. *Secretan*, 1871:[1] "Nobody has been able to improve on the practice as to valued policies, which has been recognised and adopted by shipowners and underwriters, and has, at least among honest men, the advantage of giving the assured the full value of the thing insured and of enabling the underwriter to obtain a larger amount of profit."

The most authoritative document on the English law of valuations is the memorandum on Over-Insurance, Valued Policy, and Constructive Total Loss, written by Mr. Justice Willes in 1867, and printed as Appendix lvii. in volume 2 of Report of the Unseaworthy Ships Commission of 1874. In § 2 of this memorandum we find:

> In the absence of proof that the value fixed by the contract is so exaggerated as to be a mere cloak for gambling, in representing more than any possible interest which the assured could have in the ship and outfit, or that the exaggeration was fraudulent with a view to cheat the underwriter, the latter is bound in case of total loss to pay the agreed sum. It is only when the over-valuation is so exaggerated as to show to the satisfaction of a jury that it must have been designed in order to obtain more than a just and complete indemnity that the insurance is void.

That Lord Mansfield would have acted on this principle is clear from his words in *Lewis* v. *Rucker*:[2] "If it should come out in proof that a man had insured £2000 and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated." (The Act referred to is 19 Geo. II. c. 37, prohibiting wager policies.) "There are many conveniences from allowing valued policies, but where they are used merely as a cover to a wager they would be considered as an evasion."

It must be confessed to be impossible to define *à priori*

[1] L.R. 6 C.P. 616. [2] 2 Burr. 1167.

the exact point at which excessive valuation becomes fraudulent. Indeed it is questionable whether it is ever from figures alone that one arrives at conclusions respecting fraud;[1] but figures read in the light of the facts preceding, accompanying and succeeding the insurance, may help to establish conclusively a charge of fraud. In the case of *Haigh* v. *De La Cour*, 1812,[2] it was found that goods on board the *Maria* were insured for £5000, invoices for that amount being shown to the underwriters. Claim was made against the underwriters. It was discovered that the goods were worth only £1400, and it was contended that up to that amount at least the underwriters were liable. But the invoices proved to be fictitious, and the bills of lading interpolated, and when something like barratrous handling of the ship was proved, the insured value became evidently fraudulent. Chief Justice Sir J. Mansfield said, "If the plaintiffs intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract." Cases have occurred in the history of commerce in which the insurance of four times the amount of invoice would be quite justifiable; for instance, that of shipments of silver to Japan, made for the purpose of obtaining in exchange gold at the Japanese ratio of 4 to 1, when the prevailing ratio in the rest of the world was about 15½ to 1 (H. Cernuschi, *Monetary Diplomacy in* 1878, p. 16). Similarly, in such insurances as those of contraband cargoes, or cargoes destined to run a blockade, one can imagine a very high valuation put on goods whose value would be enormously enhanced by their mere arrival at their intended destination.

The case of *Irving* v. *Manning* (House of Lords, 1847[3]) referred to the policy value of the *General Kidd*, £17,500. The vessel was so damaged that after an expenditure of £10,500 in repairs she would be worth only £9000. This was held to constitute a total loss, and to justify a claim for

[1] Mr. Justice Willes in *Lidgett* v. *Secretan*, 1870 (L.R. 6 C.P.), speaks of a value "so *outrageously* large as to make it plain that the assured intended a fraud on their underwriters."

[2] 3 Camp. 319. [3] 1 H. of L. Cas. 287.

the full valuation insured, £17,500. In the course of the case it was brought out that the words of the policy merely stating the value do *not* amount to an agreement "that for *all* purposes connected with the voyage, at least for the purpose of ascertaining whether the ship is a total loss or not, the ship should be taken to be of that value";[1] but they "mean only that, for the purpose of ascertaining the amount of compensation to be paid to the assured when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the quantum of the assured's interest." Dealing with the point raised that by this means the assured would under a contract of mere indemnity obtain more than a compensation for his loss, the judges replied that it was so, that "a policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages."

In *Barker* v. *Janson*, 1868,[2] another important judgment was given. The ship *Sir William Eyre* was much damaged on her outward voyage from Glasgow to New Zealand, and was sent for repairs to Calcutta. She was insured for £8000 at and from Calcutta for three months, commencing thirty days after her arrival there. On reaching Calcutta she was dry-docked, and found to be not worth repair, the underwriters on the outward policy paying £7000. While the vessel was still in dry dock, and before expiry of the three months, for which the second policies covered her, she was totally destroyed by a cyclone. Claim was made for the full amount insured, £8000; against this it was contended that the policy value being enormously above the true worth of the vessel should be reopened. Chief Justice Bovill held that the transaction was made in good faith; he said "an exorbitant valuation may be evidence of fraud, but when the transaction is *bonâ fide* the

[1] "So that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired."

[2] L.R. 3 C.P. 300.

valuation agreed upon is binding." Mr. Justice Willes remarked in his judgment, "Here there was no wager, the insurance having been *bonâ fide;* and it having been settled by *Irving* v. *Manning* that valued policies are valid if there be no fraud or wagering, I think it would be wrong to make any doubt in this case." Earlier he remarked, "It is said that there was a mistake as to the state of the ship; but a mistake, to entitle the parties to reopen a contract of valuation, must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract."

The consideration of mistake as affecting valuation came before the courts in *Williams* v. *North China Company*, 1876.[1] The ship *Queen of the Colonies* was chartered from Batavia to the United Kingdom. The assignees in Java of the charter-party insured the estimated amount of the freight, valued £5941; and on the same day with the same office their advance against freight valued £513. Taking the terms of the charter-party into consideration, the Court of Appeal decided that the former insurance was intended for the protection of the shipowners, the charterers having protected themselves by the second insurance for the amount of the advances they had made in accordance with the charter-party. The shipowners were therefore interested in the freight less advances, not in the advances at all. In his judgment Chief Justice Cockburn said, "You cannot open the policy to inquire into the question whether or not there has been over-valuation, but you can do so to see if the claim of the assured is coextensive with the subject matter of the insurance. Here it is not." The Master of the Rolls (Jessel) added, "In a valued policy you cannot open the policy; but that does not touch the question of what it was that was valued." It is consequently only in a very limited sense that it can be said that mistake is a ground for opening the valuation of a valued policy.

In the United States of America the law respecting

[1] 35 L.T. N.S. 884; 3 Asp. Mar. L. Cases 342.

valuation is substantially the same as in England. Phillips (§ 1183) gives the following: "If the valuation is neither intended as a cover for a wager *by both parties*, nor fraudulently made, it is binding on the parties, in case it can be carried into effect, and will as between them determine the value of the property. And the circumstance of the property being valued very high has not in itself been held to be a sufficient proof of a wager, or of a fraudulent intention on the part of the assured." Mr. Justice Willes, in the memorandum already quoted, says: "Upon the general subject of valued policies the laws of the United States thus appear to be identical with those of England."

The French Code de Commerce is very meagre on the subject of valuation; § 339 provides that, "If the value of the goods is not fixed by the contract, it may be established by the invoices or by the books, in default (of these) the valuation of them is made in accordance with the price current at the time and place of loading, inclusive of all duties paid and expenses incurred until on board." The French policy on merchandise contains a special clause providing that in case of goods insured with a certain valuation, underwriters in case of loss or average demand proof of the real values, and in case the valuation is found to be excessive they may reduce it to cost price plus 10 per cent, unless they have expressly agreed to a higher increase and fixed its amount. This in effect forces merchants who desire to insure more than invoice and 10 per cent to declare the percentage they want added to invoiced prices.

The General German Commercial Code is very full in its provisions on the subject. For open policies the provisions of § 786 hold:

> § 786. The full value of the insured object is the insurable value. The sum insured shall not exceed the insurable value. The sum insured has no validity so far as it exceeds the insurable value.[1]

In §§ 795, 797, and 799 provision is made for the

[1] Arnold's translation.

valuation of ship, freight, and cargo when no special contract exists respecting the values:

Ship. Its actual value when the underwriter's risk began.
Freight. The amount of freight as per the vessel's freight contracts, or if none exist or the cargo is on shipowner's account then the customary freight.
Goods. Their value at time and place of shipment, plus all costs till on board and including insurance.

By § 793 it is provided that in case of valued policies when the parties have agreed on a value for insurance, that value is taken as binding between the parties. But the underwriter is entitled to demand a reduction of the valuation if he can prove that it is seriously excessive, and the words in §§ 795 and 799, "This rule applies also when the insurable value of the vessel (goods) has been inserted,"[1] seem to indicate that anything much exceeding the values named in these sections would be considered excessive. As regards freight, § 798 provides that when an insurance is done on freight without specifying whether gross or net freight is intended, it is taken to be done on gross freight.

The Dutch and Portuguese codes and the Belgian law are said by Victor Jacobs (*Etude sur les assurances maritimes et les avaries*, Brussels, 1885) to permit the underwriter in every case to reopen the valuation in the policy, unless it be fixed by arbitrators appointed by the two parties. The Italian code (§ 612) regards a valuation as exclusively the work of the assured, unless it has been preceded by a survey accepted by the underwriter. In that case the underwriters cannot impugn the valuation, unless for fraud, dissimulation, or falsification (§ 435, pt. ii.). The new Spanish code of 1885 limits (§ 747) insurances on freight to the amount appearing in the contract of affreightment; and on ship (§ 751) to four-fifths of the vessel's value. In cases of evident over-valuation a distinction is drawn between over-valuation in error and by fraud; in the former the insurance is reduced to the genuine worth of the article insured, as fixed by common accord of the parties or by

[1] Arnold's translation.

appointed experts; in the latter the policy is rendered null and void, the underwriter retaining the premium, "without prejudice to the suitable criminal proceedings" (§ 752, Raikes's translation).

Closely connected with these questions of valuations is the theory of the true value of a ship put forward by Lowndes (Law of M. I. p. 13), namely that a ship being merely a freight-earning machine, her true worth is the present value of all her freights plus what she will fetch for breaking up, that is as old metal and timber. If this is taken to be the proper basis for the valuation of ships, then, when a vessel is fully insured up to this valuation, there evidently ought to be no separate insurance of freight. No doubt the market values of ships tend more and more, as they approach the end of their career, to fix themselves on this basis; but in the early years of a vessel's life it is much more the rule to value a ship at what she cost less what she has earned net for her owners, and to correct that value up or down in accordance with the variation in the cost of building vessels of similar size and equipment. It may even be doubted whether a policy valuation based on such a calculation as that suggested by Lowndes (supposing it to be possible) would be unimpeachable from a legal point of view. For in the discussion of insurable interest it will be found that a mere expectation of possession of property or profit is not substantial enough to justify an insurance; there must be actual pecuniary interest in the insured object or some firm engagement providing for such interest. Consequently the only freight engagements that could be reduced to a present value for the purpose of valuing a ship in a policy would be firm freight contracts that could be enforced by the courts. As a matter of fact it is clear that the firm freight engagements of any named ship are in amount far inferior to what is usually called her selling or commercial value.

Valuation Clause.—The validity of the valuation given for a ship in a policy is sometimes made of greater strength and effect by the addition of such a clause as the following:—

The valuation stated herein shall by mutual consent in all questions under this policy be taken to be the value of the vessel.

This form of the clause has now been almost universally abandoned, but clauses of a similar character are in frequent use, and will be discussed below under the heading of Constructive Total Loss (p. 152).

CHAPTER V

INSURABLE INTEREST—SUBJECTS OF INSURANCE—MULTIPLE INSURANCE

BEFORE proceeding further in the discussion of the policy it seems better to consider at this point two subjects closely connected with Valuation, namely Insurable Interest, and Subjects of Insurance.

(1) *Insurable Interest.*—As the contract of insurance is essentially a contract of indemnity, it follows that before this contract can take any effect there must first have been exposure to loss; in other words, without a previously existing chance of loss or exposure to loss, no merchant would think of becoming party to a contract the object of which is to indemnify him for loss and so protect him from loss. It is this element in insurance that differentiates it from all quasi-contracts such as wagering or betting. The assured and the underwriter do not say about a venture in which neither is concerned "we make an agreement that if this vessel or cargo (or whatever it may be) arrives you pay me so much, and if it is lost I pay you so much." That would be a simple wager. They do not even agree that in the case of loss of a vessel or cargo in which the assured is actually interested, the underwriter shall pay an arbitrarily fixed sum, having previously received as the consideration for the agreement a certain proportion of this sum, to be retained by him whether the venture is lost or arrives in safety. That would merely be a more limited and defined wager. An appreciation of the fundamental difference between such wagers and insurance joined to considerations of public policy and a desire to repress the wild speculation that accompanied and survived the South Sea Company,

resulted in the passing of an Act of Parliament on the subject in 1746 (19 Geo. II. c. 37). The preamble of the Act points out that the intention was to put an end to the clandestine export of prohibited articles, such as wool, and to engaging in prohibited or suspected trades, parties concerned in these securing themselves "under pretence of insuring against the risk on shipping and fair trade against loss and producing a diminution of the public revenue." The Act enacted "That no insurance shall be made on any ship or ships belonging to His Majesty or any of his subjects, or any goods or effects laden on board such ships, *interest or no interest*, or *without further proof of interest than the policy*, or *by way of gaming or wagering*, or *without benefit of salvage to the insurer*, and that every such insurance shall be void." In spite of this illegality such policies continue to be executed; they are in themselves valueless in a court of law, being without any legally obliging effect on the underwriter, and perhaps on that account are respected with the most studious care. They are simply deliberately drawn memoranda of an obligation of honour between the two parties.[1]

Addenda.

The difference between such "pretended" insurances and the genuine insurances which Parliament meant to encourage is most clearly explained in the words of Mr. Justice Lawrence in *Lucena* v. *Crawfurd*, 1802.[2] Arnould (p. 282) reports them as follows: "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively

[1] In *The Oxenholme* (*Roddick* v. *Indemnity Marine Insurance Company*, Appeal Court, 1895) Smith, L.J., was "very strongly of the opinion that the honour policy, which was altogether null and void, could not be put forward by the insurance company as a defence, and that in that respect he differed from Mr. Justice Kennedy" (in lower court). Cf. Kay, L.J., in same case, "p.p.i. policies, that is to say, policies upon which no action could be maintained, but the terms of which were certain of being observed."

[2] 2 B. & P.N.R. 269; 1 Taunt. 324.

that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce the damage, detriment, or prejudice to the person insuring. . . . To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing and the interest derived from it may be very different. Of the first, the price is generally the measure; but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended." The words "benefit from its existence, prejudice from its destruction," taken in connection with a marine venture may be paraphrased "benefit from the safe arrival of the venture in question, prejudice from loss or damage suffered by it." But that benefit or prejudice must not consist solely of the good or bad result of the insurance itself; it must pre-exist and be the precedent cause of the effecting of the insurance.

The ideal of insurable interest is absolute ownership, and the nearer one comes to that the clearer is the right to effect an insurance. But short of property there are many relations in which people may stand to goods, vessels, advances, profits, and freights that fairly and equitably entitle one to the protection of an insurance policy. These may be divided into relations of responsibility and relations of risk of profit and of loss as in the following cases:—

A. Goods. (*a*) Relations of responsibility. If goods are put in charge of a lighterman for conveyance from shore to ship, or *vice versâ*, or for transit across a river, the lighterman, being a common carrier, is liable for all and every loss and damage to these goods unless proceeding from the Act of God (*vis major*, *force majeure*) or of the King's enemies. The goods may or may not be insured by their owners, but that is a matter in which the lighterman has no concern, he cannot claim the protection of their policy even if such a policy exists.

He is therefore "so circumstanced in respect of these goods as to have benefit from their existence, prejudice from their destruction" (to use Mr. Justice Lawrence's words), and if he is not willing to bear this risk on his own shoulders he is entitled to pass it on to another person by insurance, namely to an underwriter.[1] Similarly, in the case of a wharfinger or any other bailee of goods. If a salvor working under contract with a shipowner or shipmaster, acting on behalf of all concerned in a wrecked venture, is asked to remove salved goods to some market for sale, it is usual and proper that these goods should be insured, unless the owners or underwriters of certain parcels or shipments declare that they do not want them insured against this risk of removal. Similarly, if a salvor has incurred certain expenses for which he is responsible to third parties, in saving goods and forwarding them to a proper place for sale or reshipment, he is entitled to insure at least his out-of-pocket disbursements incurred in the operation of salving. If a shipmaster, acting as agent for all concerned in any venture, finds it necessary to tranship cargo from his own vessel to another for conveyance to destination, he is entitled to insure the cargo for the part of the voyage to be performed in the other vessel if the original bill of lading does not give permission for such transhipment.

(*b*) Relations of risk. Ownership of goods when they are exposed to sea perils evidently constitutes an insurable interest of the most unmistakable kind. But as soon and in so far as the property passes from seller to buyer so does the insurable interest of

[1] But, however this underwriter may word his policy, he can never be called to make good any loss or damage proceeding from the Act of God or of the King's enemies, because the lighterman being never damnified by either of these causes can never be in need of indemnity against their effects, and is not entitled to claim indemnity from his underwriter on behalf of a third party.

the seller cease, and he cannot transfer to the buyer the interest in any insurance he has effected unless such transfer is specially contained in the contract of sale (*North of England Oil Cake Company* v. *Archangel Marine Insurance Company*, 1875).[1] Similarly a seller who contracts, for example, to deliver goods free on board ship, cannot obtain protection from a buyer's policy even should it cover the risk of transit from shore to ship; the buyer having no pecuniary interest in the goods at that time has no claim for indemnity which he can transfer to the seller, as it was not possible that he should be damnified at the period when the goods were at the seller's risk. Similarly, if a consignee of goods has made an advance against their value he is entitled to protect himself by insurance against the risk of the loss of his advance which might result from the loss of the goods (*Hill* v. *Secretan*, 1798).[2] Lowndes (Law of M. I. p. 9, note) quotes the rule given by Mr. Justice Willes in *Seagrave* v. *Union Marine*, 1866.[3] "The general rule is clear, that to constitute interest insurable against a peril it must be an interest such that the peril would by its proximate effect cause damage to the assured." If, therefore, the consignee has no other concern in the goods than merely getting possession on behalf of the owners, whether shippers or consignees, then he is not damnified by the loss of the goods at sea, and consequently can never have the need of indemnity against that loss (except perhaps the amount of the commissions which he would *certainly* secure for the handling of the goods if they did arrive at destination). Further, in the case of a wrecked venture, if a salvor has contracted for payment in a lump sum or in a stated percentage of the value of salved goods payable when they reach a place selected for sale or reshipment, he is evidently pecuniarily concerned in the

[1] L.R. 10 Q.B. 249. [2] 1 B. & P. 315.
[3] 3 L.R. 1 C.P. 320.

safe arrival of the goods at that place, and is consequently entitled to insure his interest in them.

It is to be noted that in the case of goods transferred in whole or in part of their value from one party to another, the total amount insured by all the parties should not exceed the full value of the goods. But this limitation evidently does not extend to the case of any subsequent interest arising, like that of the salvor just mentioned, out of the consequences of a sea peril. The original relations of buyer, seller, and their underwriters are not mixed up with those of the salvor and his underwriter.

B. Ship. The owner of the whole of a ship is obviously entitled under Mr. Justice Lawrence's dictum to insure his property; and it was decided by Lord Ellenborough in *French* v. *Backhouse*,[1] 1771, that the owner of a share or shares in a ship is entitled to insure his share or shares. "Each separate share in the ship is the distinct property of each individual part owner, whose business it is to protect it by insurance, so that the insurance of another cannot be binding on such proprietors without some evidence importing an authority by them." Consequently without precedent authority or subsequent ratification, no insurance effected by a part owner or managing owner on the shares belonging to other part owners is binding on them. In the case of ship companies or single-ship companies there is usually a clause in the Articles of Association $^{\text{and}}/_{\text{or}}$ the resolution appointing the managers, conferring on them the authority to effect insurances, and in some cases stipulating that the amount insured shall not fall below a named amount. Where it is not very inconvenient and unworkable it is most desirable that the insurances on a ship should all be effected by one person, or at least all on the same conditions, especially of

[1] 5 Burr. 2727.

valuation. The confusion, annoyance, and disappointment arising from variation of valuation in the policies of part owners are incredible.

(*a*) Relations of responsibility. The plainest case is that of a charterer who hires a vessel from her owner, agreeing to return her to her owner at the end of the time for which she is hired; the charterer having the use of the vessel at his own risk. He is entitled to insure the vessel as he is *pro tempore* in the position of owner, being absolutely responsible to the owner for the property hired. In such an arrangement a value will probably be mentioned in the charter, and it would be expected to be only for the excess of the vessel's whole worth to the owner beyond the amount stated in the charter that the real owner has an insurable interest: but this is not so.[1] Captors of a vessel incur certain responsibilities to pay costs and charges in case the vessel turns out to have been improperly taken as a prize: they have therefore a proper insurable interest (*Boehm* v. *Bell*, 1799).[2] Similarly, a shipmaster moving his ship for repairs to a port other than the nearest convenient port becomes responsible for the safety of the ship, and is therefore entitled to insure her value. If a ship's agent at destination is instructed to sell the vessel and can only do so on condition of delivering her at another port before obtaining the purchase money, he is evidently entitled to insure the vessel for at least the price agreed; so that if the vessel is lost her owners are placed in as good a position as if the vessel had been sold and delivered at original destination.

[1] The ground given is that the owner is not bound to trust exclusively to the credit of the charterer, but may likewise protect himself by a policy of insurance (*Hobbs* v. *Hannam*, 3 Camp. 93). But if in case of a loss both owner and charterer recovered and the latter remained solvent and paid the owner the value of the ship, surely the matter would be treated as a case of double insurance; see *Godin* v. *London Assurance*, 1758 (1 Burr. 489). [2] 8 T.R. 154.

(*b*) Relations of risk. An insurable interest exists in any case in which the ship herself is the security upon which money has been lent: such is the interest of a mortgagee. The mortgagee need not specify the nature of his interest, he can recover on an ordinary policy on the ship (*Irving* v. *Richardson*, 1831).[1] A mortgagee is not entitled to insure more than the sum he has advanced, unless the excess of this amount is insured on account of the mortgagor. The position of the mortgagor is different: he is entitled to insure his ship for her full value; for although in case of her loss the security of the mortgagee is gone, the mortgagor is still liable for the debt. (Arnould, p. 307, citing *Allston* v. *Campbell*, 1779.)[2] But what if the mortgagor is a single ship company with liability limited and capital fully paid up? The assets of the company may consist of the ship herself and nothing more. If the vessel in such a case be lost, can the mortgagee claim the benefit of the company's insurances, and by instituting legal proceedings (say in bankruptcy), get the policies included among the assets of the company?

C. Advances. The most general form in which this interest nowadays presents itself is that of general average expenses. A vessel meets with some accident in her voyage which compels her to return to her sailing port or put into an intermediate port of refuge: while she is there certain expenses are incurred which are paid by the ship's agent on behalf of all interests. But these expenses are payable by ship cargo and freight in certain proportions, to be determined at the close of the venture and at the destination. There is therefore an insurable interest for the payer of these expenses from the port of refuge to the destination.

In former times the most ordinary form of

[1] 1 Mood. & Rob. 153; 2 B. & Ad. 193.
[2] 4 Brown's P.C. 476.

advance was the bottomry bond. When a captain found himself unable to defray his expenses in a foreign port and could raise no money on his own credit or the shipowner's, he was "in his instant unprovided necessity" (in fact, *in direst need*) empowered *ipso facto* to raise money by pledging his ship for repayment. The cash thus obtained was repayable within a fixed number of days after arrival at destination; if the vessel did not arrive the bottomry bond remained unpaid. The lender of money on bottomry had thus an insurable interest: but in accordance with Lord Mansfield's decision in *Glover* v. *Black* in 1763,[1] "respondentia and bottomry must be mentioned and specified in the policy of insurance."[2] The respondentia bond was a similar document in which the cargo was pledged. It sometimes happened that both ship and cargo were pledged, in which case the document embodying the contract was called a bottomry and respondentia bond. By the Ordinance of Louis XIV. (Book III. Tit. 6, Art. 16) borrowers on bottomry were forbidden to insure the amount lent to them, under penalty of nullity of the policy and corporal punishment. Lenders on bottomry were restrained by the same penalties from insuring their expected profits on their ventures. The Code de Commerce forbids the borrower on bottomry to insure the amount he borrowed. The German code permits the lender on bottomry to insure his loan and the maritime interest. The Italian and new Spanish codes provide that on ship and goods only the excess of

[1] 3 Burr. 1394.

[2] The question whether the borrower or lender on bottomry has an insurable interest is easily solved by applying the ordinary principles which govern insurable interest in general, and taking into consideration the nature and effect of the particular instrument of hypothecation, and that no rules other than the ordinary rules of insurance law are required for its solution.—Arthur Cohen in *Law Quarterly Review*, April 1895.

what is covered by bottomry and/or respondentia may be insured.

D. Profits being derivatives of the material subjects concerned in a marine venture are with them exposed to perils, and consequently those concerned in them have an insurable interest. The amount of such interest is not usually shown separately in policies, it is generally added to the valuation of the article on which the profit is expected. When the insurance on profit is done in this form it benefits only parties who have an interest in the goods. To make sure that insurances on profit alone represent a genuine interest in goods, it was decided in *Stockdale* v. *Dunlop*, 1840,[1] that the assured to secure payment must be legally interested in the goods when they were lost. In the case of *Hodgson* v. *Glover*, 1805,[2] Mr. Justice Lawrence decided that the assured on profit must show that if there had been no shipwreck there would have been some profit (Arnould, p. 291, note f).

E. Freight. It is impossible to avoid introducing here the great maritime interest freight, which was nowhere mentioned in the printed matter of the English policy prior to 1749. There is no interest concerning which more diverse views have been entertained or regulations devised. Bearing in mind Lowndes' view of the true value of a ship (p. 74), it is apparent that if the valuation of a ship is fixed at such an amount as will include her net earnings on the voyages for which she has firm freight contracts, the freight ought not to be insured separately. But as has been pointed out already, the valuation of ships is fixed in a very rough and ready way, cost of building, amount of shipping in the market, etc. etc., all influencing the price fixed, and as a named freight is a definite sum it has been found convenient to deal with it separately from ship. The one rule upon which English law insists

[1] 6 M. & W. 224. [2] 6 East 316.

is that to constitute an insurable interest in freight there must exist some legally enforceable bargain or contract. In *Patrick* v. *Eames*, 1813[1] (the orchella-weed case), Lord Ellenborough stated that, "If such contract had been proved, the assured would have been deprived by the loss of a profit which they otherwise must certainly have received, and for which they would have been entitled to an indemnity." Consequently, whatever be the state of the freight market when a vessel leaves in the hope of getting a freight elsewhere, there is no insurable interest on freight until she has been fixed for her next voyage for some particular employment. In France there have been many difficulties on this subject, a very sharp distinction being drawn between *frêt à faire* and *frêt acquis*, the insurance of the former being forbidden. But by the law of 14th August 1885, permission was given to insure (*inter alia*) net freight.

(2) *Subjects of Insurance.* — The discussion of the meaning to be attached to the general words in the policy intended to describe briefly the various subjects insurable by the policy and of the nature of insurable interest has resulted in the enumeration of many subjects which may be insured. But there is not in any document or enactment of English law, an enumeration *seriatim* of the various classes of things that may be insured such as is found in the commercial codes of France, Germany, Italy, Spain, and other continental countries. In the absence of such an enumeration, the best plan that can be adopted is to take Mr. Justice Lawrence's definition of insurable interest, and to say that every object or relation to which this definition can be applied is one on which insurance may legally be asked and effected, unless there is some statutory prohibition or some valid decision against the legality of the assurance.

In the examination of the words of the policy "any kinds of goods and merchandises," it was stated that

[1] 3 Camp. 441.

limitations have been placed on the use of these words as describing subjects of insurance: but that must be taken in the sense that certain subjects must be described by their specific name when it is intended that they shall be covered by policy of marine insurance. For instance, the absence of the word "freight" or "hire" from the printed words of the policy does not mean that this interest cannot be covered by the policy. It is evident that the interest meant to be protected by an insurance of freight would be misdescribed by the words "goods or merchandises." The interest "freight" must therefore be specially designated in writing in the policy. Similarly, live stock has been decided not to be properly included under the words "goods and merchandises," and it seems likely that the same holds true of fresh or frozen beef or mutton, which is now so largely imported from North and South America and New Zealand. These interests must therefore be fully specified.

But of the objects in which the would-be assured has an interest properly describable as an insurable interest in terms of Mr. Justice Lawrence's definition, some even if specifically described are not admitted to be legally insurable. Such are slaves, the insurance of whom as articles of trade was prohibited in this country by the same Act of Parliament of 1806 (47 Geo. III. c. 36) which abolished the African slave trade. This prohibition can now only be regarded as due to the same spirit as succeeded in abolishing the slave trade: it would evidently have been futile to forbid the carrying on of a trade in British vessels, which might be carried on in foreign ships protected by British insurance policies. The other subject on which insurance is forbidden in almost all maritime states is seamen's wages. As Marshall puts it, "It seems to be the policy of all maritime states to use every precaution to prevent the desertion of the seamen, to interest them in the preservation of the ship, and to invite them to the most vigorous exertions in times of danger." The English case cited by Marshall is *Webster* v. *De Tastet*, decided in 1797.[1]

[1] 7 T.R. 157.

This prohibition extends to every member of the crew under the master. But the master being considered of too good a position to be influenced solely by his own immediate interest in the venture is permitted to insure his pay or commission as well as any share he may have in the vessel.[1] With these two exceptions it may be taken that there is no illegality in insuring any object in which an insurable interest fulfilling Mr. Justice Lawrence's dictum can be proved to exist.

The prohibition of the insurance of seamen's wages recalls the somewhat similar prohibition in France, until 14th August 1885, of insurance on freight at risk (*frêt à faire*). The shipper or charterer was permitted to include in his insurance the amount of freight prepaid or guaranteed (*frêt acquis*); but the shipowner was not allowed to insure the balance of the freight. One reason given in the French books for this regulation is that it was hoped by means of it to secure the care and diligence of shipowner, master and crew. But what the great Émerigon gives as the real reason is that the freight at risk (*frêt à faire*) being an uncertain profit, the result of good fortune on the voyage, does not exist until the voyage is closed, and therefore cannot become a subject of insurance for the voyage. This is subtle; but the strict application of this principle would prohibit the insurance of any profit or increase of value on ship or goods, which would be entirely alien to the spirit of English insurance law.[2]

Multiple Insurance. — In close connection with the questions of insurable interest and subjects of insurance

[1] Cf. Shakespeare, *Measure*, ii. 2, 130.

[2] Prior to 1885 M. Alfred de Courcy of Paris, the most eminent French underwriter of his day, used to hold that it was an error to say that French law prohibited the insurance of freight: he said that all it did was to refuse to such insurances legal sanction and recourse to the courts. It is true there was no penalty beyond the nullity and voidance of the policy, or rather the absence of legal sanction; but is not that in itself to some extent a deterrent provided by the law? See also case in Marseilles Tribunal of Commerce, 1897, Companies represented by Raymond de Campou and Ytier & Rocoffort against Bank of Antwerp.

lie the problems arising from the insurance of the same interest twice or several times over with different underwriters. The principle adopted in England is that the assured has the right to make his choice of the policy against which he will make his claim for any loss that may occur; but the underwriters on that policy are entitled to claim from the other underwriters on the same interest a rateable contribution to their loss. In *Davis* v. *Gildart*, 1776,[1] a merchant insured his interest, whose value was £2200, first in Liverpool for £1700 and then in London for £2200, the evidence showing that there was no fraudulent intention in effecting the second policy. It was held by Lord Mansfield that the merchant could recover from his London underwriters the full £2200 insured by them, subrogating them in his rights against the Liverpool underwriters.

In cases where the same amount is without fraudulent intention insured with two sets of underwriters, the solution is extremely simple, the assured claims his loss in full from whichever set he pleases, and they in turn claim one half from the other set. Cases in which the amount is not the same are treated as cases of double insurance of the amount insured on the smaller of the two policies.

It is extremely unusual to find any interest more than doubly insured; but in cases of triple, quadruple, or other multiple insurance the principles now prevailing regarding double insurance would apply.

The cases of multiple insurance that most generally occur are those in which buyer and seller, shipper and consignee, or others in similar relationship, have each insured the same goods or interest without knowing that the other has done the same. If the fact of double insurance becomes known before the lapse of the risk insured, the best course to adopt is to advise both sets of underwriters of the fact, to ask each of them to reduce his amount insured by one half and to return one half of the premium. If, on the other hand, both insurances are effected by the same person, and that without fraudulent intention and not

[1] Park 424.

in sheer forgetfulness, it is only fair to assume that he had some reason for effecting the additional insurance (such as dissatisfaction with the security of his first policy), and there does not appear to be any fair ground for claiming return of premium, although the final incidence of the claim is the same.

French Law.—The law of France differs entirely from that of England. In France the incidence of the loss is determined by the date of the policy, the earlier policy alone is liable if its amount is equivalent to the value of the interest insured, the later policies do not come in except for the difference between the value and the amount insured with the earlier underwriters. For any further amount the later underwriters incur no liability, and they return the premium less ½ per cent on the amounts then treated as null.

American Law.—In the United States the practice is to adopt the French rule; it is said that clauses to this effect are very generally introduced into the policies: the question arises whether the practice has now become a custom of American insurance so strong as to need no specification in the policy.

German Law.—In Germany the general rule laid down in the Maritime Code, Art. 788, is that the earlier insurance alone is valid up to its full amount, the later taking up the balance of the value, if any. But in the following exceptional cases the later policy is legally valid:—

Section 789.—The later insurance is, however, legally valid notwithstanding the previous insurance—

(1) When at the conclusion of the later insurance it is agreed with the underwriter that rights arising out of the previous insurance shall be ceded to him.

(2) When the later insurance is concluded with the condition that the underwriter shall only be answerable so far as the assured may be unable to enforce payment against the former underwriter on account of insolvency, or so far as the former insurance is legally invalid.

(3) When the former underwriter is by formal notice released from liability so far as is necessary to avoid a double insurance, the later underwriter being informed thereof at the conclusion of the later insurance. In this case the former underwriter is entitled to the full premium although he is freed from his obligation.

Section 790.—In case of double insurance the later insurance, not the previous one, is legally valid, when the previous insurance has been taken as agent without authorisation; the later insurance, on the other hand, being effected by the assured himself, provided the assured at the time of effecting the later insurance was not informed of the previous one, or gives notice to the underwriter at the time of its conclusion that he repudiates the previous insurance.[1]

In all other cases of genuine double insurance, the code provides that the return for short interest shall be ½ per cent of the sum insured, or when the premium is under 1 per cent then one half of the premium, unless some other proportion is named in the contract or is customary in the place where the insurance is effected (§§ 894, 895).

Italian Law.—Art. 608 of the Italian Code of Commerce reads:—

If several insurances on the same thing are without fraud effected by different parties interested, or by several representatives of the same interested party who have acted without special instructions, all the insurances are valid, but only to the amount of the value of the thing. The parties interested have action against any one of the underwriters at their choice with recourse of the underwriter who has paid against the others in proportion to their interest.

Spanish Law.—The Code of 1885 provides:—

Section 782.—If several insurances have been made without fraud on the same thing, the first only will be effective, if it covers the whole value. The subsequent insurers are free from liability and will receive ½ per cent of the sum insured.

If the first policy does not cover the whole value of the thing insured, the liability for the residue will fall on subsequent insurers according to the date of the execution of the policies.

Section 783.—The assured is not absolved from payment of the premiums in full to the several insurers if he has not given the later ones information of the rescission of their contracts prior to the arrival of the article insured at its port of destination (Raikes's translation).

[1] Arnold's translation.

CHAPTER VI

THE POLICY: PART II

The Perils Insured against

So far the policy has merely detailed the person and objects insured, the valuation, the amount of it covered by the underwriters concerned, the commencement, duration, and end of the adventure for which the insurance is made. The second part of the policy describes the kind of risk against which the underwriter grants the assurance, the perils insured against. The formula in which the risks are detailed is very striking: the underwriters or assurers are represented as being content to bear and as actually taking upon themselves certain risks here specified as adventures or perils. It is as if they were replying to definite questions put to them asking whether they agreed to accept the risk of each of the perils named one by one, and were answering to each question, "Content, we take that upon ourselves." The result is that while the underwriters assent categorically to cover all the named perils, they are just as plainly exempt from liability to indemnify the assured against loss arising from any peril not specified. Care has therefore been taken to make the formula as comprehensive as possible. Arnould says (p. 31) of the words as we now know them: "The clause in its present state may fairly be regarded as affording a protection against almost every casualty which can possibly happen in the course of any voyage"; but when he adds the remark, "and for which it is meant that the

underwriter shall be answerable," he suggests the inquiry whose meaning or intention is to be taken as determining the perils that ought to be covered. That the formula contained in the policy has been found fairly adequate to the requirements of the commercial community is proved not only by its almost universal acceptance in English insurance, but even more from the fact that in all its essentials it is the form adopted in the United States.

This paragraph of the policy falls into two parts: the first enumerates certain definitely named adventures or perils; the second contains what are termed "the general words."

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are . . .

In this introduction to the description of the risks assumed by the underwriters there are two points to be specially noticed. First, the designation of these risks as "adventures and perils" indicates that contingencies contemplated are not the ordinary inevitable occurrences common to all navigation, but are such extraordinary fortuitous events as may be reckoned accidental. This principle will be found of great importance in the consideration of the amounts recoverable from underwriters, excluding as it does loss or damage arising from wear and tear and from inherent defect (*vice propre*). Next, the introduction of the seemingly unnecessary words "in this voyage" deserves attention; the words are not found in the Florentine form of 1523, but as they occur in a London form of 1613, the introduction of them may be entirely the work of English underwriters. Their effect is obvious: they give additional definiteness to the limitations of space and time within which the underwriter's liability is in force; they imply that not merely are the underwriters liable for the accidents occurring between certain termini in the course of navigation in the usual way between them, but that it is only for such accidents as do so occur, not for the consequences of earlier or the causes of later disasters. This sharp and insistent definition of what may be called the sphere of the

policy coming into view so early as the beginning of the seventeenth century, sufficiently indicates the frame of mind that is ready to accept and carry out in its entirety the maxim, "Regard the immediate cause and not the remote one" (*causa proxima non remota spectetur*).

. . . (perils) of the seas. . . .

It is natural that the first class of perils enumerated in a marine policy should be perils of the seas; so natural, that it is more than probable that ninety-nine out of every hundred readers of a marine policy never pause to consider the exact intention of the words. The first impression of the meaning is usually that they cover everything that happens at sea. But clearly everything that happens at sea is not a peril, nor is it a peril "of" the seas. Evidently the framers of the policy (who in this section have most closely followed the Florentine model of 1523) were of this opinion, for they proceed to name other adventures, some of which could not happen except at sea—such as perils of men-of-war, pirates, jettisons, takings at sea—with others which could happen either on land or at sea, such as fire, restraints and detainments of kings, etc. In *Cullen* v. *Butler*, 1815, Lord Ellenborough distinguished strongly between "peril *on* the seas" and "perils *of* the seas."[1] It therefore becomes necessary to learn exactly what is covered by the words "perils of the sea," and since July 1887 assured and underwriters have been able to know what the House of Lords considers is contained in the words, and consequently to be sure of the sense in which the words will now be interpreted in every court inferior to the House of Lords.

In the case of the *Xantho*s, 1887,[2] an action was brought

[1] 5 M. & Sel. Phillips remarks (§ 1099): "The distinction is fanciful, since it would put winds and lightnings out of the class of perils of the seas, as being those of the atmosphere," etc.; but this seems over subtle, as Lord Ellenborough was merely showing that one could only claim under the general words and not as "perils of the sea," damage resulting from being fired into through mistake in being taken for an enemy.

[2] L.R. 12 App. Cases 503.

against the owners of the *Xantho*$_s$ by owners of cargo on board that vessel lost by a collision with the *Valuta*$_s$, arising from the careless navigation of the *Xantho*$_s$. The question arose out of the contract of affreightment, in which the words "perils of the seas" occur. In his judgment Lord Herschell put his view of the meaning of the words "perils of the seas" in the following terms: "I think it clear that the term 'perils of the seas' does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled, that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which *may* happen, not against events which *must* happen." The judgments of the other Lords practically concurred with this; and it was clearly laid down that as respects the casualty of collision, "perils of the seas" had the same meaning in a contract of affreightment as in a policy of insurance. These expressions of Lord Herschell are almost a reproduction of what was said by Mr. Justice Lush in *Merchants Trading Company* v. *Universal Marine Insurance Company*, 1870:[1] "The term 'perils of the sea' denotes all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel—casualties which may, and not consequences which must, occur." Lowndes (Law of M. I. p. 107) justly objected to the word "violent" in this definition, for he said a calm or a fog may be as dangerous as a storm. In reality a far greater objection attaches to the word "natural," for surely tempest and mist are as natural as gentle breezes and brightness. But the second part of the definition is, with the exception

[1] M'Arthur, p. 111, refers L.R. 9 Q.B. 596.

of one word, admirable. It is not clear what induced Mr. Justice Lush to use the word "consequences," involving as it does reference to unnamed causes, instead of some less intensive and merely descriptive but perfectly adequate word, such as "incidents." This definition completely disposes of the adequacy of such explanations as make inevitableness[1] of an occurrence the test of its being a peril of the sea; if it is really inevitable, it is too completely a part of the ordinary, necessary routine of the voyage to be accidental. Similarly, Mr. Justice Lush's definition excludes from perils of the sea all ordinary tear and wear arising from the nature of the objects insured, and all the incidental results of such ordinary occurrences as must take place in the course of the specified adventure. In the *Inchrhona* case (*Hamilton* v. *Pandorf*, House of Lords, 14th July 1887[2]) Lord Bramwell said, "I think the definition of Lord Justice Lopes very good. 'It is a sea damage, occurring at sea, and nobody's fault.'" But "sea damage" seems vague.

To illustrate the class of damage excluded by the definitions of Mr. Justice Lush and Lord Herschell. If a vessel undertakes a voyage to a port, the approach to which is notoriously such that the vessel must ground every low water, loss or damage from such grounding is not chargeable to underwriters as the consequence of a peril of the seas. Using the words of Lord Tenterden in *Wells* v. *Hopwood*, 1832[3] (Lowndes, Law of M. I. p. 198), the ground is not "taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence." Of such a character is the approach to Limerick. There are also many tidal harbours in which it is impossible for vessels above a certain size to lie safely always afloat. If a vessel above that size is sent to such a harbour the underwriter is not responsible for the results of such grounding as occurs in the ordinary course of such a vessel's stay at that port. But the intervention of a comparatively

[1] See Phillips' definition below, p. 99.
[2] L.R. 12 App. Cases 518. [3] 3 B. & Ad. 20.

unimportant accident, involving, say, a slight change of the position of the vessel, may be sufficient to take the grounding out of the category of ordinary. There is often much difficulty experienced in determining the point of transition from the ordinary operation of the powers of nature and their perilous action. This whole class of questions will come up later in the discussion of stranding.

Similarly in the insurance of a cargo, if it turns out at the end of a venture that a cargo has perished or deteriorated through the operation of causes originating entirely within the article itself, the loss is not attributed to perils of the seas. Take, for instance, the case of a grain cargo shipped in what is externally good order and condition, but in reality too soon after cutting to have become quite hard and dry. After a voyage of some length it will be found that this grain has become seriously affected by what grain merchants and surveyors know as "sweat." This damage is not the result of anything except the nature of the grain itself; no such result would show itself in a cargo of ore, pig-iron, coal, or timber, so that evidently it arises from what is known as the *vice propre* or "inherent defect" of the article shipped and insured, perhaps better described as the "essential character" or "inherent quality" or "inherent nature" of the goods.

It is not only sometimes difficult, as has been said above, to determine the point at which the operation of an elemental power becomes a peril,[1] but it is occasionally found hard to decide whether what is admitted to be an accident proceeds from a peril of the sea or from something else. In this connection the case of *Montoya* v. *London Assurance*, 1851,[2] is valuable as leading up to an important theoretical principle. In the words of Arnould (p. 789), and Maclachlan's *Arnould*, 6th ed., p. 754): "A vessel loaded with hides and tobacco shipped a quantity of seawater, which rotted the hides, but did not come directly

[1] Cf. Phillips, § 1087. What is to be considered ordinary and what extraordinary, in the degree and effects of the perils, is a question of fact for the jury often of much difficulty.

[2] 6 Exch. 451. See Parsons, i. 546.

into contact with the tobacco or the packages in which it was contained. The tobacco, however, was spoilt by the reek of the putrid hides. It was held that in this case the perils of the sea were the *proximate cause* of the loss on the tobacco as well as on the hides." In this case the goods were damaged not by sea-water directly, but by the effects of sea-water damage done to other goods. But it should be noticed that this damage did not result from any quality or character inherent in the tobacco, such as fermentation or evaporation might indicate, but from a cause quite external to the tobacco.[1] See *Thrunscoe*, (1807, 8 Asp. Mar. L.C. 313).

There is another set of cases on the interpretation of the words "perils of the seas" of interest as showing how they are applied in cases of loss or damage at sea. They deal with damage sustained by ships $^{\text{and}}/_{\text{or}}$ cargoes from rats or other vermin. In *Hunter* v. *Potts*, 1815,[2] on a policy on goods from London to Honduras, the vessel was detained during the voyage by the sickness of the crew at Antigua. While she lay there, rats ate holes in her transoms and bottom, whereby she was rendered unfit for proceeding upon the voyage, and the cargo was sold at Antigua. Lord Ellenborough held that the consequent loss was not one for which underwriters on the goods insuring them against perils of the seas were liable (Phillips, § 1100). In the case of the *Inchrhona*, (*Hamilton* v. *Pandorf*, House of Lords, 1887),[3] merchants sued shipowners for damage to a cargo of rice during transit from Akyab to Bremen. The rice was damaged by sea-water, which found its way into the hold of the steamer through a hole gnawed by a rat in a leaden pipe connected with the bathroom. The shipowners contended that the damage was occasioned by a danger or accident of the seas; and in the House of Lords it was finally decided that they were right in their contention. Lord Herschell declared his concurrence with the view expressed in *Laveroni* v. *Drury*, 1852,[4] that damage done

[1] It is worth special mention that the ordinary American form of policy expressly excludes in the case of certain delicate goods such a liability as this.

[2] 4 Camp. 203.

[3] L.R. 12 App. Cas. 518.

[4] 8 Exch. 166.

by rats to a vessel or its cargo is not damage by perils of the sea. But he remarked that in that very case Chief Baron Pollock had said: "If indeed the rats made a hole in the ship, through which the water came and damaged he cargo, that might very likely be a case of sea damage." Thereafter Lord Herschell proceeded to say with regard to the *Inchbona*, case, "I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and therefore to be anticipated." Lord Macnaghten added, "It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care."

From the principles enounced in the cases cited above, it is evident that among the perils of the sea are included foundering, stranding, loss by collision with another ship or vessel, or through stress of weather. Phillips (§ 1099) gives a long catalogue of casualties which have been held to be perils of the seas, most of them based upon reported decisions, some, however, referring more exactly to the words of the general clause to be discussed hereafter, on which many important decisions have been given. His definition is: "Perils of the seas . . . comprehend those of the winds, waves, lightning, rocks, shoals, collision, and, in general, all causes of loss and damage to the property insured arising from the elements, and inevitable accidents,[1] though sometimes considered not to include capture and detention." He does not mention such perils as upheaval of reefs by earthquake, or rise of sea-bottom from the same cause resulting in ships being left high and dry on a hillside, as on the Chilian coast.

The mention of perils of the seas is followed in the policy by long enumeration of other perils strung together without very obvious connection, occurring much in the same order as in the Florentine policy of 1523. The only explanation of this order that offers itself as at all likely, is

[1] As to "inevitable," see above, p. 96.

that the perils were added one by one simply as they were found in the history of insurance to become necessary for the proper protection of the assured. The policy runs :—

> Men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners.

In the discussion of these, this arbitrary arrangement will be discarded, and the perils named will be classed under three heads—

I. Perils of nature or of the elements—seas, fire.
II. Perils arising from the actions of persons on board the insured vessel—jettison, barratry.
III. Perils arising from the actions of persons not on board the insured vessel—men-of-war, enemies, pirates, rovers, thieves, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever.

I. Perils of Nature or of the Elements

Fire.—The perils of the seas having been already discussed, fire remains to be dealt with.

Phillips (§ 1099), after giving the definition of perils of the seas quoted above, goes on to remark that a policy against these perils covers damage by fire. For this statement he quotes no authority and cites no decision ; but he adds in a footnote, "This would be the construction, no doubt, though the peril were not specifically insured against." Be that as it may, it is still somewhat striking that the only elemental peril named in the policy besides those of the seas is fire. To explain this it is necessary to recall the conditions of navigation under which commerce was conducted at the time the policy was devised. Marine ventures were made by sailing ships of what is now regarded as very moderate size. All the extraordinary dangers of winds, waves, rocks, fogs, tempests, calms, being already

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included in the class perils of the seas, there remained for the merchants and shipowners of the sixteenth, seventeenth, and eighteenth centuries, no other danger from the forces of nature with which they were acquainted except fire, either in the shape of flame or ignition, or of lightning or other form of electrical incandescence.

But fire once admitted as a peril insured against, received the most extensive application. In his decision in *Gordon* v. *Rimmington*, 1807,[1] Lord Ellenborough says: "Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured, and if the ship be destroyed by fire it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state." The case on which the judgment containing this statement was delivered was one in which an insurance had been effected on the commissions of a captain on a voyage from Bristol to the African coast and thence to the West Indies. The vessel was chased by a French privateer of much greater strength, and when escape was seen to be impossible the captain and crew burnt their ship to prevent her falling into the hands of the enemy. The policy was held to cover this loss.

Similarly in *Busk* v. *Royal Exchange*, 1818,[2] an action on a policy in which the loss arose from the negligence of the mate in lighting a fire in the cabin and not seeing it properly extinguished, Mr. Justice Bayley said (as reported by Marshall, 496): "It had been argued that they (the underwriters) were only liable where the ship had been *wilfully* set on fire, because barratry was one of the risks expressly mentioned in the policy, and negligence of the master was not; but there was no authority, in our law at least, which said that they were not liable for a loss, the *proximate* cause of which was one of the enumerated risks, though the *remote* cause might be traced to the negligence of the master and mariners." The Court held the underwriters liable.

Both Arnould (p. 831) and Phillips (§ 1094) state that the assured is entitled to indemnity in case of a vessel being burnt by the municipal authorities from fear of its being

[1] 1 Camp. 123. [2] 2 B. & Ald. 73.

infected and causing a pestilence. This statement, however, is not based on any English or American legislation or decision, but is taken from Émerigon (i. 429), who mentions the case of the Dutch vessel *Adam*, with rice from Damietta to Marseilles, about the year 1748. The vessel experienced a storm off Majorca, and the captain tried to run into port for safety. But the Spanish authorities learning that the vessel came from the Levant declined to permit their entry, and after sending craft to take the captain, crew, and cargo on to Marseilles, set fire to the ship. The underwriters paid the loss without demur, because, as Émerigon says, "neither captain nor crew were in fault." He proceeds to report another case, that of the *Grand Saint Antoine* in 1719, in which the captain's fault released the underwriters. After declaring at Leghorn that some of his crew had died of "pestilential fever," he proceeded to Marseilles, did not stop at the quarantine ground, but going to the health office declared on 25th May 1720 that the deaths had been caused by bad provisions. However, the watchmen and stevedores died; in consequence the ship was removed to the quarantine ground and burnt by ministerial order on 20th September. In December 1723 the Admiralty Court of Marseilles condemned the underwriters to pay the loss, but this sentence was reversed by decree of February 1725. It thus appears that the only decided case reported is against the opinion stated absolutely by Arnould and Phillips. In the present state of sanitary science such a case is not likely to occur again; but even if it did, it is not certain that an underwriter would be held liable for the loss.

It is evident from what precedes that intentional as well as accidental burnings may be covered by the word "fire" in the policy.

But certain non-intentional burnings cannot properly be called accidental. Such are those occasioned by the damaged state of the cargo. In *Boyd* v. *Dubois*, 1811,[1] Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common prin-

[1] 3 Camp. 133.

ciple of insurance law the assured cannot recover for a loss which he has himself occasioned" (M'Arthur, p. 116). Somewhat akin to this decision is that of *Pirie* v. *Middle Dock Company*, 1881,[1] which referred to a cargo of coal in which fire broke out spontaneously; it was held that the owner of cargo cannot take advantage of his own wrongdoing. Spontaneous combustion is the most serious form of *vice propre* or inherent defect. As M. de Courcy (*Commentaire*, p. 218) most admirably remarks, "Spontaneous combustion is a form of words employed to indicate a production of internal facts without known external agents. It is never certain that the combustion has been spontaneous." As a matter of fact "spontaneous" combustion is the cause which is assumed to have occasioned a fire when no other real cause is proved to have in fact existed. Speaking generally, it would appear that underwriters on goods are not responsible for damage done to these goods by a fire resulting from the condition in which they were shipped. Arnould (p. 831) gives it as his opinion that the underwriters on a ship would be liable for loss by fire occasioned to the ship by this cause. Apparently it would be fair to assume that the underwriters on other cargo in the ship would likewise be liable for a loss occasioned to these goods by this cause.

By the decision in the case of *The Knight of St. Michael*[2] (Barnes, J., in Admiralty Division, 25th January 1898) underwriters on freight were held liable for loss of freight consequent on discharge of cargo to prevent probable damage by fire, although the fire had not actually occurred. The case is peculiar and not exactly analogous to that of any other peril.

In the *Lodore*[3] case, Bigham, J., held that loss of freight arising from condemnation of cargo so heated as to be unfit to carry on to destination is claimable on freight policies without set off of contribution in General Average.

There is much similarity between fire and explosion. This point was elaborated by Lord Esher (Brett, L.J.) in

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[1] 4 Asp. Mar. L.C. 388.

[2] 14 Times L.R. 191. But compare and contrast this with Lord Ellenborough's judgment in *Blankenhagen* v. *London Assurance*, 1808 (1 Camp. 453) that "fear of capture" is not a risk contemplated under the policy (*vide* pp. 114, 117).

[3] *Iredale* v. *China Traders*, Q.B.D. 4 July 1899 (15 Times L.R. 460)

his judgment in the case *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Coy.*, 1880.[1] In that case "the steam in the boilers burst the boilers, and the steam escaped, and the steam escaping into the ship destroyed the ship; it blew up the deck of the ship and wrecked the ship so that she was a complete wreck." These are Lord Esher's own words as given in his judgment in the Court of Appeal in *Hamilton* v. *Thames and Mersey Marine Insurance Company, Limited*, 1887.[2] He proceeded: "There, with considerable difficulty, I as a matter of fact came to the conclusion that an explosion of steam getting into the ship and destroying the ship was sufficiently like the effects of fire upon a ship—and fire was one of the terms of the policy—to allow it to come under the general words. . . . Now I am perfectly willing to say indeed I have it strongly in my mind—that in coming to that conclusion of fact, I went to the verge of imagination; I should not be surprised, on the contrary I think my mind would most obediently and willingly acquiesce, if that view of the case were overruled." In *Hamilton* v. *Thames and Mersey*[3] in the House of Lords, Lord Herschell expressed his decided preference for the later view of Lord Esher. In America it has been decided that underwriters are not liable for damage done by the explosion of a steam boiler. Parsons (vol. i. p. 560, note) discusses ignition and explosion at considerable length, citing, *inter alia*, the decision in *Scripture* v. *Lowell Mutual Fire*. It is worth notice that the common explosives like gunpowder actually require a spark or flame (that is, something of the nature of fire) to release their imprisoned forces and bring about a sudden violent burst. But it is quite different with the explosives that act only when affected by impact or percussion, for instance dynamite. The action in this explosive is entirely different from that of fire; so that a wreck caused by an explosion of dynamite could certainly not be successfully claimed as a loss by fire.[4]

[1] L.R. 6 Q.B.D. 51.

[2] L.R. 17 Q.B.D. 198.

[3] L.R. 12 App. Cas. 484.

[4] Cf. Parsons, i. p. 561, note, where in reviewing the case of *Scripture* v. *Lowell Mutual* (10 Cushing 356) the following occurs:

So far, the fire has been taken to be on board the ship carrying out the assured venture. But the case has arisen in which an explosion arising from fire has done serious damage to a steamer lying some distance from the point where the explosion occurred. In the great petroleum fire and explosion at Antwerp in 1889 one of the Red Star Company's steamers was damaged, although she was lying some distance from the petroleum tanks, and on the side of the dock farthest from the tanks. Underwriters settled the claim "without prejudice," considering the explosion sufficiently akin to a result of fire to justify their payment of the damage. But it is not certain that they would have admitted liability had the substance whose explosion undoubtedly caused the damage been one which a severe stroke or a mere fall could set off.

In connection with the peril of fire it may be remarked that underwriters have lately had some examples of claims for damage done to delicate articles like flour, by smoke arising from accidental fires occurring on board Atlantic steamers, or resulting from the measures taken to extinguish such fires. Without for the moment taking into account the final incidence of the loss in such cases, and without admitting that the alleged damage is in all cases actual or serious, it may still be suggested that if real damage of any serious extent were found, the principle on which liability would be determined would be akin to that adopted in the decision of *Montoya* v. *London Assurance*, 1851.[1]

II. Perils arising from the Actions of Persons on Board the Insured Vessel

(*a*) *Jettison.*—It is remarkable that the most ancient scrap of marine law that has come down to modern times deals with jettison and with the method in which loss by jettison was to be made good and apportioned. Justinian's

[1] The court said their opinion excluded "all damage by mere explosions not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion." 6 Exch. 451.

Digest, Book XIV., Tit. 3, Sect. 1, reads as follows: "It is decreed by Rhodian law that if to lighten a ship a jettison of goods has occurred, that which has been given for all shall be replaced by the contribution of all."[1] Rhodes early became an important place in Levantine trade, and was a crossing point of all the commercial interests of the Mediterranean east of Carthage. So "Rhodian law" is probably simply an expression of early Mediterranean practice or tradition. Apart from any question of final incidence and apportionment the thing itself is simple; it is merely the throwing overboard of part of a vessel's tackle or cargo to lighten or relieve her when she is in emergency. If there is real emergency, and a merchant's goods are sacrificed to prevent threatened loss becoming real loss, that merchant is in no worse a position than if the loss had actually occurred, nor is his underwriter. The question of the profit derived by the other parties of the venture from his loss is another matter that demands separate treatment. But to justify a merchant in making claim for such loss by jettison, the Lombard underwriters held that the sacrifice must have been made in circumstances of absolute necessity. It is evident that unnecessary jettison might easily become a source of gain to unscrupulous assured. On the other hand, if a merchant was not fully protected by insurance he might be unwilling to have his goods sacrificed. The result of this was the creation of an elaborate etiquette of "regular" jettison,[2] so elaborate that Émerigon reports (i. 591) that Targa during sixteen years' magistracy at Genoa saw only four or five cases of it, and these were suspected of fraud simply because the formalities had been too well observed. It is evident that in cases of imminent peril any spending of time on formalities would be senseless trifling. Consequently, irregular jettison was recognised as having legal and commercial validity. M. de Courcy remarks (Weil, § 293) on the puerility of the distinction,

[1] *Lege Rhodia cavetur ut si levandæ navis gratia jactus mercium factus est omnium contributione sarciatur quod pro omnibus datum est*

[2] See *Rolls of Oleron*, Art. 8; quoted by Lowndes, *General Average*, p. 6.

from which it would result that the more legitimate and necessary a jettison is the more "irregular" must it be.

But assuming that jettison has been made in good faith and honesty, it does not follow that the value of the goods is claimable from the underwriter on a policy of the ordinary form. For the only goods covered by a policy, unless express stipulation to the contrary is made, or it is the notorious custom of the trade to carry cargo on deck, are goods stowed under the vessel's deck. Consequently, on an ordinary policy an underwriter is not responsible for jettison of deck cargo. In the recent case of *Dixon* v. *Royal Exchange Shipping Company*, House of Lords, December 1886,[1] arising out of the jettison of cotton from a deck house of the *Egyptian Monarch*, it was held that cargo in deck houses is, as far as jettison is concerned, equivalent to deck cargo. Consequently, in case such cargo has been thrown overboard its value can neither be recovered from the underwriter on the ordinary form of policy, nor by way of contribution from the other parties in the adventure.[2] Again, goods thrown overboard in consequence of inherent defect, or of the *undue* development of their inherent qualities (*vice propre*), cannot be recovered from underwriters using the ordinary form of policy, *e.g.* meat that has become putrid and dangerous (*Taylor* v. *Dunbar*, 1869).[3] The test question is, "Is there a loss from perils insured against?" See *Pink* v. *Fleming*, 1890.[4]

With regard to cargo carried on deck in accordance with the universal custom of a trade, there appears to be no doubt that if the whole cargo belongs to one person, or if it belongs to several persons all engaged in the same trade, cargo thrown overboard may be claimed for as jettisoned; it is only because it has been admitted to be jettisoned that it can become the subject of general average or general contribution. But some classes of goods (vitriol, ether, carbolic acid, and other chemicals of inflammable,

[1] 12 A.C. 11.

[2] It remains at the risk of the party by whom or with whose consent it was loaded in an improper place.

[3] L.R. 4 C.P. 206. [4] 25 Q.B.D. 396.

volatile, or corrosive character) are in all trades properly carried on deck and nowhere else. The existence of such goods on board a ship is not necessarily known to any one except the loading broker, the shipper of the goods, and the shipper's underwriter. The latter in taking the risk on the goods is aware of the exceptional perils to which they are by their position exposed. In case of an ordinary jettison, where such articles as carboys of vitriol are jettisoned from deck simply to lighten the ship, the underwriter of the vitriol is no doubt responsible for the loss. But if the jettison occurred, not to lighten the ship, but to remove from the ship and the rest of the cargo the danger that would arise from the carboys or other vessels being broken, the loss would seem to be more truly due to the *vice propre* of the fluids, and therefore the custom has now arisen to state *specially* that they are insured against all risks of jettison and washing overboard.

Under all other circumstances, unless these be brought about by the negligence or default of the owner of the property sacrificed, jettison is recoverable from the underwriter on the common policy.

A dishonest jettison performed with the shipowner's consent or under his instructions renders him liable for the value of the goods so disposed of; he cannot plead the exception in his bill of lading. But if performed by the master or crew on their own motion, and without the approval or connivance of the shipowner, it becomes what is known as barratry.

(*b*) *Barratry of the Master and Mariners.*—On this subject the old text-books go into great detail, and with reason. The world in those days was not mapped, buoyed, and lighted as it is now; there was no regular postal system, no network of telegraphs existed; agents in foreign ports knew no one connected with a maritime venture except the master of the ship; in short, ship and cargo were infinitely more at the mercy of the captain and crew than they are to-day. That is one reason why most of the reported decisions on this subject are old. Another is that during the long period that England has been at peace

with the maritime nations of Europe, there have not been for badly-inclined shipmasters the same convenient opportunities of committing barratry. Prize[1] court business, blockade running, illegal traffic, smuggling wholesale are accomplishments for the present forgotten, or at least dormant; they need war to shock them into activity.

Barratry is excessively difficult to define; the definition must exclude everything of the nature of mere mistake, misjudgment, even to a certain point, negligence; it must be wide enough to embrace actions of the master against owners $^{\text{and}}/_{\text{or}}$ co-owners, of the crew against the master $^{\text{and}}/_{\text{or}}$ owners, and to include an element of criminality or gross malversation. An early definition, that of Lord Hardwicke, that barratry is "an act of wrong done by the master against the ship and goods," is described by Arnould as "the tersest and (perhaps) best"; but in view of later decisions one has to read so much into it that it seems incomplete and inadequate. Arnould (p. 844) gives his view as follows: "Barratry in English law may be said to comprehend not only every species of fraud and knavery consciously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are, in fact, damnified." In this definition the words *by whatever motive induced* are most important. If a master lost his ship, or had it captured, or in some way taken away from its owners in consequence of his wilfully and on his own motion endeavouring by some illegal act to gain some advantage for himself, or even to make a profit for the owners of ship and cargo, the act would be a barratrous act, the loss a loss by barratry. But there can be no barratry if the owner consents to the illegal act or connives at it.

Such acts as the following are barratrous: scuttling a ship, intentionally running a ship ashore with the object of throwing her away, setting a ship on fire, abandoning the voyage on which the venture started (*Earle* v. *Rowcroft*,

[1] *Vide* p. 111, note.

1806),[1] illegally selling a ship and cargo and appropriating the proceeds, deviating from the vessel's proper course for the captain's private business or convenience (*Vallejo* v. *Wheeler*, 1774).[2] This last case brings out the distinctive note of barratry; mere deviation does not constitute barratry, deviation with criminal intent does. As Lord Ellenborough said in *Todd* v. *Ritchie*, 1816,[3] "To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment." Similarly, simple negligence on the part of a master resulting in the seizure of his vessel by foreign customs' authorities in consequence of smuggling by the crew is not, in English law, barratry,[4] but any intentional omission of any watchfulness or commission of any negligence on his part with the object of getting the ship confiscated would constitute the case one of barratry. The last important case on this subject is *Cory* v. *Burr*, House of Lords, April 1883,[5] in which the vessel concerned was seized by the Spanish customs' authorities in consequence of the barratrous act of the master in smuggling abroad without the consent of his owners. But if the owner's negligence is such that the sailors are enabled to continue smuggling without his interference, then he is debarred from the protection of his policy against barratry; as Lord Ellenborough put it in *Pipon* v. *Cope*, 1808,[6] it was the duty of the assured to put down these repeated acts of smuggling for which the ship had been seized no less than three times; and by his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters were discharged.

In the last paragraph devoted by Phillips to the discussion of barratry (§ 1084) he quotes a remark of Lord Mansfield, "It is strange that barratry should have ever crept into insurance." In spite of Phillips' attempted disproof of the strangeness of a merchant's or shipowner's wish

[1] 8 East 126. [2] Cowp. 154. [3] 1 Stark 240.

[4] Herein English law differs from French. Émerigon says with Valin and Pothier that the term "barratry" includes all varieties of fraud as well as of simple imprudence, want of care, and want of skill both of the master and of the crew (Weil, § 169).

[5] 8 App. Cas. 393. [6] 1 Camp. 434.

to secure himself against the risk of the dishonesty of the master, it does seem curious that underwriters should be ready, as they are, to insert in their common form of policy what practically amounts to a guarantee of the commercial morals of any captain and crew, with whom they are in less intimate connection, whom they have much less chance of knowing than the shipowner has. There is much less difficulty in comprehending the reasonableness of indemnifying cargo-owners against the barratry of master and crew.

III. Perils arising from the Action of People not on Board the Insured Vessel

Men-of-war, enemies, pirates, rovers, thieves, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever.

To realise the full meaning of these words, one must think of a condition of affairs in which states made sea-war with one another, not only with their fleets of warships, but also with the armed vessels of private persons making a trade of war, and with ships licensed to attempt to do damage within the enemy's frontier. To that must be added such figures as Paul Jones, the Moors of Algiers, the Sallee rovers, and the Chinese sea pirates. Then it must be borne in mind how slowly news spread before the establishment of a regular postal and telegraph service, and how slow all locomotion was by land and sea before the introduction of steam as a motor. Vessels toiled to their port of destination only to find it blockaded against their flag, or got in just in time to be captured and put up to prize[1] court and condemned as good prize,[1] and by the time the court had done with them, port and vessels might be recaptured by the ship's own nation or by a friendly power.

The intent of this paragraph of the policy would be

[1] Should be *prize*, being the Latin *prensus*, through the French *prise*; not *prize*, which is the Latin *pretium* through the French *prix*

made clearer if the wording were slightly rearranged and made to read :—

> Surprisals and takings at sea by all men-of-war, enemies, letters of mart and countermart, pirates, rovers, and thieves, arrests and detainments of all kings, princes, and people, of what nation, condition, or quality soever.

To take the words as they stand in the policy, "men-of-war" cannot be mistaken, they are the declared and authorised warships of a belligerent nation. "Enemies" are not merely unfriendly people, but open declared foes, people under a hostile flag and primarily privateers under a hostile flag, not equal in martial dignity to men-of-war, but still equipped for carrying on authorised warfare. The phrase, "letters of mart and countermart" (or marque and countermarque) is used to designate one special class of privateers.[1] In former times it was customary for sovereigns to grant to such of their subjects as had suffered seizure of their property by the subjects of other states, letters or commissions authorising the former to make good their loss by retaliation on fellow-subjects of the seizers. The vessels employed in this service by persons provided with such a document were commonly described by the name of the document. It is evident that this class of cruiser is much less wide than that embraced under the word "enemies," and is not at all equivalent to what is described under "men-of-war." But all three have this in common, that they own a national flag, make war only against the declared foes of their own nation, and do so only after obtaining the permission of the supreme authority of their own nation.

On the other hand, "pirates, rovers" are depredators who own no nationality and are living in what is practically a state of outlawry. Both words mean the same thing, or at most the difference is a slight difference of degree; it may be that as the pirates of certain regions (mostly Mohammedan Moors or Arabs) were generally known as "rovers," the word was added to designate them especially.

[1] It is worth remark that privateering was formally abolished by the Treaty of Paris, 1856, at least as regards the signatories of that treaty.

Piracy is a very grave criminal offence, so that the commission of any act held by the courts to be piracy entails grave consequences. It has been decided that when a crew mutinies, seizes, and makes off with their ship, the offence is piracy (*Brown* v. *Smith*, 1813).[1] It will be noted that this is one of the offences which has been already described as barratry; Arnould remarks (p. 841, note *t*) that in *Dixon* v. *Reid* "such loss was laid as loss by barratry, which seems the true mode of alleging it." Similarly, when Canton coolies being conveyed in a ship to Chili murdered captain and crew and took away the ship, the act was held to be an act of piracy (*Naylor* v. *Palmer*, 1853).[2] One most surprising decision on piracy is given by Arnould thus (p. 841): "When a meal mob on the coast of Ireland violently boarded a corn-laden ship, took the government of her from her captain and crew, ran her on a reef of rocks whereby the cargo was damaged, and then forced the captain to sell the corn at a low price, Lord Kenyon held that this was a loss by pirates" (*Nesbitt* v. *Lushington*, 1792).[3] The action of the mob certainly in some respects resembled the action of pirates, but it would be better described as robbery or theft. As for "thieves," they are the class of pillagers who would certainly use violence, but might respect human life. They were in sea-life the counterpart of the footpads of the last century, and need not be assumed to own no national flag any more than a footpad need be assumed to have no country or nationality. They must be "sturdy" thieves, not "sneak" thieves, violent pillagers, not mere pilferers, or as the law-books put it, *latrones*, not *fures*. Some American policies amplify the English form and say "assailing thieves," a formula which would describe the aggressors in *Nesbitt* v. *Lushington*[3] much better than "pirates." Pilferage or petty theft is regarded as so entirely the result of negligence or carelessness, that any loss arising thereby should be borne by the captain. There was a great deal of sense in this

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[1] 1 Dow P.C. 349.
[2] 9 B. & Cr. 718; 8 Exch. Rep. 739; 10 Exch. Rep. 382.
[3] 4 T.R. 783.

view in the days when ships were of a size that the captain could easily keep an eye over all that was done on board; nowadays, in altered conditions, the task is enormously more difficult.[1]

All these hostile parties agree in having for their object "surprisals and takings at sea."

(*a*) "Surprisal" is a word rarely heard in modern commerce, being generally replaced by the word "capture." Either word denotes a taking by the enemy as prize, in time of open war or by way of reprisals, with the intention of depriving the owner of all right of property over the thing taken. Under this clause underwriters are liable to pay the insured value of ship or goods captured by the enemy or by pirates, the necessary expenses of recovering a captured ship, and any sum paid to stop condemnation in the prize court. But it must be noted that it has been decided on grounds of public policy (*Furtado* v. *Rodgers*, 1802,[2] and *Kellner* v. *Le Mesurier*, 1803[3]) that the risk of capture by *British* vessels cannot legally be covered by *British* underwriters, whether the policy was effected before or after the outbreak of hostilities (*Gamba* v. *Le Mesurier*, 1803).[4] Since these decisions, policies have been issued covering these forbidden risks, but they are merely honour documents and cannot be enforced in any British court.[5]

(*b*) By "takings at sea" are meant the stoppage and forcible taking into port of neutral vessels, probably stopped on account of their cargo being suspected to belong to the enemy. The term is less forcible than "surprisals," because the intention is not to deforce the neutral shipowner of his property, but only to stop its employment to the taker's disadvantage. "Taking at sea" is commonly expressed in modern commercial language as "seizure."

But short of such stringent measures as surprisals and

[1] See Lord Justice Bowen in *Steinmann* v. *Angier Line*, 7 Times L.R. 398.

[2] 3 B. & P. 191. *Vide* pp. 103 and 117 (*Butler* v. *Wildman*, 1820, Abbot, C.J.) [3] 4 East 396. [4] 4 East 407.

[5] "Fear of capture" not covered by the policy. Lord Ellenborough in *Blankenhagen* v. *London Assurance* (1 Camp. 453), *v.* pp. 103, 117.

takings at sea there may be other inconveniences in the stoppage of property. Without declaration of war a government may declare what is called an embargo, a prohibition to remove certain goods or vessels. For instance, in 1892 the Russian Government prohibited the export of certain classes of grain. The owner of a ship loaded with such grain ready to sail when the regulation was issued would be deprived of his property (or at any rate deprived temporarily of the disposal of his property) by the administrative act of a friendly foreign government. This is the kind of risk contemplated in the words, "arrests, restraints, and detainments of all kings, princes, and peoples," etc. etc. Addenda. There is an act of deprival or detention without hostile intentions; it is an authorised act of a recognised authority, royal, princely, or national (for here "people" certainly means "nations").[1] If it results in the owner being for any length of time deprived of his property, and if he is not a subject of the government effecting the arrest, the under- Addenda. writer will under the ordinary form of policy have to make good to him his loss.

The risks of capture, seizure, and detention are often excepted by underwriters from their policies, and this has usually been effected by the adding in the margin of the policy a clause known as the "free of capture and seizure" (F.C. & S.) clause. The form of this clause varies, and the exact effect depends on the wording. Meanwhile it may be noted that the addition of such a clause accomplishes more than the mere deletion of the words relating to surprisals and takings at sea in the body of the policy, because loss by pirates and rovers "was formerly included amongst the *general perils of the seas*," says Arnould (p. 841, citing Park), "and probably would still be held to be so." Consequently a deletion of the special words would not be sufficient to free the underwriter from the risk. But the F.C. & S. clause is so generally used that it has come to be regarded as part of the conditions on which an

[1] Mr. Justice Bullen, in *Nesbitt* v. *Lushington*, 1792 (4 T.R. 783), said the word "people" in this clause means the supreme power of the country, whatever it may be.

ordinary quotation is made or risk[1] accepted. When the underwriter is willing to accept the risks of surprisals, takings at sea, etc., he deletes the marginal F.C. & S., and then his liability remains as it would have been had the F.C. & S. clause never existed on his policy.

The clause just examined completes the statement of the special perils named in the policy; thereafter follow the general words :—

> And of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, etc., or any part thereof.

On first reading, it seems as if in this clause the underwriter assumed in it liability for every kind of loss or damage not already explicitly specified; the policy seems to give in these words all that has been excluded by the words already discussed. As it was found that the liberty to touch and stay at all ports must be interpreted strictly in connection with the words "in this voyage," so here it will be found that the apparently unlimited words, "all other perils," etc. etc., must be interpreted strictly in accordance with the principle of identity of genus with the enumerated perils.

The first case in which the British courts were called upon to interpret and enforce this clause was *Cullen* v. *Butler*, 1816,[2] in which one British ship mistaking another British ship for an enemy fired upon her and sank her. The Court inclined to the opinion that the loss was not one by "perils of the sea," but held that it was covered by the general words. Lord Ellenborough said (Phillips, § 1126, and quoted by Lord Herschell in *Hamilton* v. *Thames and Mersey Marine Insurance Company*, House of Lords, 1887):[3] "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects

[1] The F.C. & S. clause exempts underwriters from claims for amount of penalty paid as price of release from seizure consequent on smuggling. *Cory* v. *Burr*, 1883, 5 App. Cases 393.

[2] 5 M. & Sel. 461. [3] L.R. 12 App. Cas. 484.

of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." The principle here laid down is known as the principle "*ejusdem generis* (of like kind)."

In *Butler* v. *Wildman*, 1820,[1] the captain of a ship threw a large quantity of dollars overboard to prevent their falling into the hands of an enemy by whom he was pursued. Chief Justice Abbot said: "If not, strictly speaking, jettison, it is *ejusdem generis*, and therefore falls within the general words." In *Phillips* v. *Barber*, 1821,[2] the same judge said: "These general words are indeed restrained in construction to perils *ejusdem generis* with those more particularly enumerated in this policy." In *Davison* v. *Burnand*, 1868,[3] Mr. Justice Willes expressly recognised the rule of construction laid down in *Cullen* v. *Butler*, 1816,[4] and said, "The question is not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from perils of the sea."

In the case of the *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company*, 1880,[5] a claim was made for the payment of damage done to the steamer *Investigator*, through the bursting of its boiler. Upon examination it was found that the bursting was due to the thinning down of the shell of the boiler, and that the thinning down was due chiefly to the action of bilge-water on the outside of the boiler and to the accumulation of sediment in the inside. Lord Selborne and Chief Justice

[1] 3 B. & Ald. 398. But see p. 103, note 2, *Blankenhagen* v. *London Assurance*.
[2] 5 B. & Ald. 161.
[3] L.R. 4 C.P. 117.
[4] 5 M. & Sel. 461.
[5] L.R. 6 Q.B.D. 51.

Cockburn held that the explosion was a peril within the general words: Lord Esher (then Brett, J.) held that the explosion was so much *ejusdem generis* with fire as to come within the general words: but he added that without the word "fire" *nominatim* in the policy he could not have seen that explosion was like the perils enumerated. The case was decided in the Court of Appeal in favour of the assured, and did not go to the House of Lords. But the whole matter came before the House of Lords in the case of the *Inchmaree*, (*Hamilton* v. *Thames and Mersey Marine Insurance Company*, 1887),[1] a test case arranged to go up to the Lords in order that, if possible, the liability of underwriters for damage to steamers' machinery insured on an ordinary marine policy should be clearly defined. To take the words of Lord Macnaghten: "The *Inchmaree*, was in March 1884 off Diamond Island, lying at anchor and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey engine and donkey pump on board, and the donkey engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water being unable to make its way into the boiler was forced back and split the air-chamber and so disabled the pump. This was the beginning and the end of the misfortune." On behalf of the assured an endeavour was made to show that the damage was covered by the general words. The Queen's Bench Division gave judgment for the assured; the Court of Appeal affirmed this judgment by a majority consisting of Lords Justices Lindley and Lopes, while Lord Esher dissenting took the opportunity of expressing his doubts of the correctness of the view he had taken in the *Investigator*, case (*West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company*, 1880).[2] In the House of Lords on appeal these decisions were unanimously reversed, Lord

[1] L.R. 17 Q.B.D 198 & 12 App. Cas. 484.
[2] L.R. 6 Q.B.D. 51.

Esher's view being maintained, namely, that the loss was covered neither by any of the special words of the policy nor by the general. The judgment of Lord Herschell was particularly full: he considered that it was "impossible to say that this is damage occasioned by a cause similar to 'perils of the sea' on any interpretation which has ever been applied to that term." And he went on to say, "It will be observed that Lord Ellenborough limits the operation of the clause to 'marine damage.' By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance."

Since the *Inchmaree*, case there has been no further litigation on the general words: the judgment of the House of Lords was decisive and unmistakable. But the immediate practical consequence was the invention of a special clause of such a tenor as to get completely round the House of Lords' judgment which was given on an ordinary policy. The use of that clause has become almost universal in policies on steamers, particularly in time policies. It reads as follows:—

This insurance also specially to cover (subject to the free-of-average warranty) loss of or damage to hull and machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Addenda.

This clause is often, for the sake of brevity, called the "*Inchmaree*, clause." The words "subject to the free-of-average warranty" are a recent addition: their effect will become clear when that warranty comes to be discussed.

CHAPTER VII

THE POLICY: PART II—*continued*

Sue and Labour Clause, Waiver Clause, Force and Effect of Policy, Consideration, Attestation

And in case of any loss or misfortune it shall be lawful[1] to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.

This clause appears in the London policy of 1613, and would seem to be indigenous to England, as no clause corresponding to it is found in the Florentine form of 1527. It is striking that the first mention in the policy of payments, charges, and expenses does not occur in reference to loss of, or damage to the subject insured, but in connection with efforts made to defend, safeguard, and recover ship or goods, or any part thereof, after a loss or misfortune has occurred.

This portion of the policy is known as the "sue and labour clause." It is, in fact, a supplementary side-contract dealing with one separate class of expenses known as "particular charges." Its operation is limited and completed by what is termed the "waiver clause," which in some policies is printed in the margin, but in the ordinary modern Lloyd's form follows the sue and labour clause as part of the text, viz.—

And it is expressly declared and agreed that no acts of insurer

[1] The American form reads: "it shall be lawful and necessary to and for the assured, etc."; the necessity thus imposed on the assured introduces into American law and practice features unknown in England.

or assured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

If the two are taken together their intent is clear: it is plain that if either party to the insurance contract takes steps to defend, safeguard, or recover property covered by the policy, these steps shall not be taken to prejudice or alter the respective positions of the parties concerned, and that when the assured, either in person or through factors, servants, or assigns, does his best to avert loss, his expenses incurred in doing this are guaranteed to him by the underwriter in proportion to the sum insured. In fact the object of the sue and labour clause is to encourage the assured, his employees, and all to whom the benefit of the insurance may have been passed, to take all possible steps to save property in danger: the object of the waiver clause is to enable the assured (and those deriving rights from him), and also the underwriter, to undertake operations and incur expenses meant for the safeguard of the property insured, without any fear of thereby introducing some new element into the contract or nullifying some step of commercial or legal procedure already taken. Abandonment, acceptance of abandonment, and waiver or revocation of abandonment will be treated at some length below.

It is to be observed that the clause providing for "suing and labouring" takes no effect until a loss or misfortune has actually occurred: it does not cover expenses incurred or operations undertaken with the object of averting the occurrence of a peril. Such expenses and operations are the elements forming another *nexus* between assured and underwriter.

There is no suggestion in the sue and labour clause of the possibility that the underwriter may take steps for the defence, safeguard, etc., of the property insured. That may be either because in the days when the policy was drawn up such a thing was unheard of, or because the right of the underwriter to take such steps was considered so unmistakable that it was unnecessary to specify it. But by the time that the parties to the contract found the necessity of devising the waiver clause, it had become apparent that the

assurer as well as the assured might and did take steps to save the property in question, so that in modern policies the right of the underwriter to step in is indirectly secured.

Of the persons whose action is in the sue and labour clause admitted as equivalent to that of the assured we may put down first the captain of the ship. His duty as respects the saving of the ship herself has never been a matter of doubt; but as to cargo there has been a certain amount of difficulty. Formerly, when the custom was for merchants to travel in the carrying ship and take charge of their goods (cf. *Laws of Oleron*, §§ 8, 9; circa 1195; quoted by Lowndes, *General Average*, p. 6), the captain did not represent the cargo owners. Even later, when merchants did not accompany their wares to sea, they usually delegated their authority to a special representative of their own, the supercargo. But as loading on the berth grew commoner and the conditions of oversea trade were changed, it became unusual for the cargo to be accompanied either by its owner or by any special representative of him. Consequently, nowadays, the only person who can in most cases take such steps as are contemplated in the sue and labour clause is the captain of the ship. In the case of the *Gratitudine*, 1801,[1] Lord Stowell decided that in case "of instant, unforeseen, and unprovided necessity," the master whose only duty to the cargo in ordinary circumstances is to keep and convey it in safety, is bound by the general policy of the law to assume the character of supercargo and agent for the cargo owner. Consequently a shipmaster is now bound to do all he can to complete the venture so far as both ship and cargo are concerned, and must act on his own responsibility, to the utmost of his skill and power, and in absolute good faith in furtherance of the interests of the principals. If he has the means of communicating with them he ought to communicate, and as agent he must carry out any instructions he gets from them so far as this is possible and compatible with that better knowledge of the actual position of affairs which he of

[1] 3 Rob. 240.

necessity possesses. He may even in case of necessity hypothecate not the ship only but the cargo also in order to raise money for the repairs of the ship (the *Gratitudine*, 1801).[1] In case of absolute necessity where he, after disaster, cannot find reasonable means of conveying goods to destination, he may sell the goods (cf. Mr. Justice Willes in his judgment in *Notara* v. *Henderson*, 1872).[2] For instance, if he has a cargo of fruit when his ship meets with disaster, and he finds that it will perish before he can manage to deliver it at the place of destination, he is entitled to sell the fruit at a place short of destination. But it is only when there is necessity for the sale of the cargo that the master of a ship has authority to act as agent for the sale of the cargo, and without such necessity the sale may not be binding on the owners of the goods (see *Atlantic Mutual Insurance Company* v. *Huth*, 1880,[3] and *Australasian Steam Navigation Company* v. *Morse*, 1872).[4] Consequently where the captain can communicate with the cargo owners he should do so.

The extension of the operations of wrecking organisations and salvage associations has in some waters greatly diminished the number of cases in which captains have to take these responsibilities. But there are still immense portions of the world where it takes months to get instructions sent in reply to the report of an accident, so that there are still only too frequent occasions for the captain to exercise the latent authority and agency vested in him. In European and North American waters, in the Bay of Bengal and on the eastern and southern coast of Australia, the work and responsibility contemplated in the sue and labour clause is generally undertaken by special corporations sending out experts who have had experience in operations at wrecks, and who have at their disposal diving-gear, tugs, pumps, and other necessary plant. The practice in such cases is for the corporation or salvage company to get written authority or instructions from the shipowner to take the necessary steps to save

[1] 3 Rob. 240.
[2] L.R. 7 Q.B. 235.
[3] 16 Ch. D. 474.
[4] 4 P.C. 222.

the venture. In some cases the authority of the captain is accepted or even preferred. Occasionally a supplementary authority is obtained from underwriters on such interests as are known to be insured with them, or such as they care to acknowledge the insurance of. This is done partly with a view to full authorisation of the person or persons engaged in the operations, and partly with a view to the proper final incidence of the expenses. The reference to charges and the underwriter's undertaking to contribute a proper proportion, found in the clause does not exhaust the question of incidence. For while the clause certainly renders the underwriter liable for all or some of the expense incurred in defending, etc., the property he has insured, there is within the policy no means of determining the amounts to be paid by the underwriters of different parcels of goods. Each policy of insurance being a contract entirely independent of all others running at the same time (unless in cases of double or multiple insurance, or of policies containing express reference to others), there is no solidarity[1] of underwriters. In practice the apportionment of the expenses has to be made quite apart from any consideration of insurance and in connection with the contract of affreightment; the amounts incurred being paid by the owners (or consignees) of the separate interests in proportion to the benefits received from the operations as indicated by the values saved. All that the words of the policy now under consideration mean is that the underwriter on any particular interest shall bear the same proportion of the expenses *incurred on behalf of these goods* as his subscription bears to the value named in the policy. Even in this limited application a difficulty may arise should the expenses incurred in the "suing and labouring" operations exceed the values recovered. If the expenses have been incurred in good faith by an agent sent to the scene of the disaster on the suggestion or selection of the underwriters, they seem to be properly chargeable to the underwriters. Even if the case were managed entirely by the shipmaster, or some agent of his,

[1] *Solidarité* (Fr.) = joint-and-several liability.

then probably the only question that can be raised is whether the person in charge acted in good faith and to the best of his ability: if so, and if his action averted a loss from the underwriters, the expenses seem equitably to fall on them. But in both of these cases it is assumed that the real value of the goods is not in excess of the amount insured; in other words, that the owner is not his own underwriter for part of the value. If he is his own underwriter then he is, to the amount not covered elsewhere, interested in the results of the operations and must bear his proportionate share of the expenses.

It is evident that the cost of operations, such as reconditioning of cargo if incurred at an intermediate port, may form a sue and labour expense, while it becomes, if incurred at port of destination, the means of estimating the amount of damage suffered by the cargo. When the question of particular average comes to be discussed, it will become apparent that in many cases expenses are in the first case recoverable from underwriters, while in the second, in consequence of the conditions of the policy regulating the underwriter's liability for damage (as distinguished from total loss), they are not so recoverable.

There is a somewhat parallel diversity in the treatment of what are called "extra charges," the incidental costs arising out of damage and claim, such as survey fees, auction charges, adjustment fees, etc. The habit has been for underwriters and adjusters to follow the custom of Lloyd's, and allow in full all such charges incurred at destination, while only allowing in proportion to the amount insured such as are incurred at an intermediate port. This custom possibly arose from consideration of the difference of the circumstances in which the expenditures take place.

It is most important to remember that the charges incurred under the sue and labour clause must be—

(*a*) Incurred by the assured, his servants, factors or assigns.

(*b*) On behalf of the property insured in a particular policy.

There are consequently excluded from the operation of

this clause (1) all expenses incurred in consequence of the action of parties not described under (*a*), such as salvors picking up property at sea, or persons voluntarily undertaking salvage work on a wreck as a speculation; and (2) all expenses not incurred for the benefit of special items of property, but for the safeguarding of the whole venture on board any ship and all sacrifices made to avert peril from the whole venture, matters which will come up for discussion later under the name of "General Average."

Force and Effect of the Policy

And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

In these words the policy has since the sixteenth century perpetuated one great tradition of English commerce. In the policy of 1613 the underwriters speak of "the best and most suerest pollacie or writinge of assurance which hath binne euer heretofore vsed to be made lost or not lost in the aforesaid street (Lumbard street) or Royall Exchange."[1] The clause has disappeared from many English policies, especially from those issued in the outports, and also pretty generally from companies' policies. But till within the last thirty-five years few English policies were issued that did not contain this clause or some variant of it. Indeed, without some such clause expressed or understood it is difficult to know what is and what is not covered by the policy. To settle this by a reference to tradition, somewhat vaguely expressed, appears a very loose and casual mode of proceeding, but it is a striking instance of a characteristically English commercial method. There is no such clause in the Florentine formula of 1523. The only parallel is the Antwerp clause mentioned in the Historical Introduction, p. 4.

[1] Mr. R. G. Marsden has traced the formula as far back as 20th September 1547; a policy in Italian issued then in London naming "questa lombarda strade di Londra."

The effect of the clause is simply that where no provision to the contrary referring to any particular point is found in the policy, the assured is entitled to recover from the underwriter whatever it has been the custom of assured to recover from London underwriters. The burden of proof accordingly lies on the assured.

The Binding Clause

And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises.

This is the form still employed by Lloyd's and other private underwriters; but being obviously not suitable for the limited liability companies which engage in the business of marine insurance, has had to be altered for their use into something like the following:—

Now this policy witnesseth that the said company takes upon itself the burden of this insurance to the amount of . . . pounds, and promises and binds itself to the assured, their executors, administrators, and assigns for the true performance and fulfilment of the contract contained in this policy.

There is only one difficulty in connection with the words: it is to determine what constitutes "true performance of the premises," or as it is expressed in the later form, "the burden of this insurance" or "the true performance and fulfilment of the contract contained in this policy." Where the policy contains a reference to the custom of Lombard Street, such as has just been discussed, the difficulty is slightly lessened. But the fact remains that the policy contains no definite statement of what is to be paid in event of certain casualties, no account of the method in which the liability of the underwriter is to be determined. These important points have from time to time been determined by the courts, as naturally disputes arose regarding the duties and obligations of the parties to this contract. Enlightened by the decisions of the judges, it is

comparatively easy for modern commercial men to know what the words of the policy contain; they have learnt to read into the policy a certain meaning. But the first reading of a marine insurance policy usually leaves the reader in a state of utter uncertainty of its real purport and effect, and it is only after experience or research that he becomes aware of what is involved in "the true performance" of the contract, namely, the payment of material losses in whole and in some cases in part, of certain deteriorations and of certain liabilities, provided that these losses, deteriorations, and liabilities result immediately from some of the perils insured against enumerated in the policy. These will be treated later in detail.

The Consideration

Confessing ourselves paid the consideration due unto us for this assurance by the assured . . . at and after the rate of . . .

This form of the consideration clause is an absolute receipt for the premium, so that delivery of the policy can be alleged as proof of the payment of the premium. As the use of such a form has not always been found convenient, many companies now word their policies thus:—

In consideration of the person or persons effecting this policy promising to pay to the said company a premium at and after the rate of . . .

The employment of this form enables underwriters to part with policies without previously receiving payment of premium and without thereby vitiating their claim for payment.

The Attestation

In witness whereof, we the assurers have subscribed our names and sums assured in *London*.

This clause is followed in a Lloyd's policy by a list of names and sums; the aggregate amount of the different sums subscribed by each underwriter equals the amount required

to be insured. There is no joint-and-several liability (solidarity) among the underwriters subscribing a Lloyd's policy, as the binding clause expressly provides that the underwriters subscribe "each of his own part." Such a clause is obviously unsuitable for the use of limited liability companies, which have consequently adopted such words as the following :—

> In witness whereof the undersigned, on behalf of the said Company, according to a Resolution duly passed by the Board of Directors, have hereunto set their hands, in London, the day of 190–.

The Articles of Association of the various marine insurance companies and the resolutions of their boards respecting the proper attestation of their policies differ very much from one another. In some cases the signature of one director is all that is required : few policies require more than two signatures, whether both of directors, or the one of a director and the other of an official. Most companies do not seal their policies.

This clause completes the policy as it existed in 1748. The remainder of the policy consists of what is termed "The Memorandum" added in May 1749 (with which addition to the 1748 policy, it is the same as appears in the schedule of 35 Geo. III. c. 63 ; the Stamp Act of 1795). No later additions have been made to the body of the policy ; they are made as required, either as marginal clauses or written in on the face of the policy. The effect of these clauses will be the subject of discussion below.

CHAPTER VIII

PRINCIPLES OF INTERPRETATION OF THE POLICY

LAWYERS and text-book writers have not spared their language when they have had the opportunity to describe the ordinary English policy of marine insurance (v. p. 28). It has been described as a badly drawn, illogical, and altogether hopeless document. Arnould (p. 16), citing Mr. Justice Buller (4 T.R. 210), says it has always been regarded by our courts of law as an absurd and incoherent document; and he gives the remark of Mr. Justice Lawrence (in *Marsden* v. *Reed*, 1803):[1] "It is wonderful that policies should be drawn with so much laxity." In *Pelly* v. *Royal Exchange*, 1757,[2] Lord Mansfield spoke of the "ancient and inaccurate form of words in which the instrument is conceived." It consequently behoves those who have to deal with this instrument to try to discover the principles on which the courts have ascertained its meaning in the cases that have come before them.

It will have been noticed that in the words of the policy and in the explanatory remarks offered above, there is constant reference to the conditions of trade as it used to be, or as it is now. It will also be remembered that in the description of the simplest form of a marine insurance (p. 10) the *common* intention of assured and assurer was mentioned as the basis of the whole transaction. It will be found that the policy cannot be interpreted properly without reference to both of these factors, and the reconciliation of them is attended with so many difficulties, that

[1] 3 East 579. [2] 1 Burr. 341.

it has become hard to judge any particular case without careful examination.

Judge Duer (M. I. i. pp. 158, 159) states that, with one exception,[1] "the actual intention of the parties is the controlling principle from which all the special rules of interpretation flow, and to which they are all subsidiary and subordinate. These rules have no positive and arbitrary force."

The great leading dictum is that of Lord Ellenborough in *Robertson* v. *French*, 1803:[2] "The same rule of construction which applies to other instruments applies equally to this, namely, that it is to be construed according to the sense and meaning, as collected in the first place from the terms used in it, which terms are assumed to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense." Addenda.

From this it is evident that while indemnity is recognised as the object which the parties framing the contract have in view, account is still taken of the phraseology actually employed.

Consideration of the phraseology of the policy leads to two conclusions somewhat divergent but still actually complementary to one another. *First*, each word must have its proper value and effect given to it. Should it become necessary to ascertain the intention of the parties in an ambiguous clause, if one interpretation of the clause would add nothing to what the contract clearly expresses elsewhere or necessarily implies, and another interpretation renders it operative by adding to the effect of the instrument, then the latter interpretation is to be adopted. It is unlikely that the parties intended only to repeat what had

[1] Namely, such conditions as are construed as warranties: in respect to these a rule of strict and literal interpretation prevails.

[2] 4 East 140.

been already stated or implied. *Second*, the policy being an agreement entered into with one intention, its true meaning should be gathered from a consideration of the whole instrument, and not of the separate clauses of which it is composed and which may in detail be contradictory.

The words of the policy being, according to Lord Ellenborough's dictum, understood in their plain sense, unless they

(1) Have a special customary sense,

(2) Have such a context that their ordinary sense is inapplicable,

it becomes necessary to examine in some detail the effects of (1) custom and (2) context.

(1) *Custom.*—As the contract of a marine insurance is a document of maritime trade, the policy is properly understood only when interpreted with constant reference to that trade. Further, as all branches of maritime trade do not agree in the details of their management, the policy is interpreted not in accordance with what may be termed the customs of maritime trade generally, but of the particular trade in which the venture insured is engaged or employed. Such general and notorious customs are enforced judicially as if they were explicitly set forth in the contract. It often becomes a question whether the evidence produced proves that a custom really possesses the requisite general and notorious character. But even in the case of a usage which falls short in respect of these attributes, the courts will enforce it if it can be shown that it was in the mind and intention of the parties when they drew up and entered upon the contract (*Bartlett* v. *Pentland*, 1830).[1] The other qualities required to entitle a custom to legal sanction are that it is reasonable in itself and not repugnant to the expressed words of the contract. The latter quality is very closely allied to that congruence of the words of the contract that forms the subject of the next section.

The great difficulty about usage is that from its nature it does not appear on the face of the contract while it is

[1] 10 B. & Cr. 760.

still true in the words of Judge Duer (i. 271) that a valid usage is *a part of the contract.* In *Preston* v. *Greenwood*, 1784,[1] Lord Mansfield said, "Usage is always considered in policies of insurance, even when the words are plain." In *Long* v. *Allen*, 1785,[2] Mr. Justice Buller states that, "Usage not only explains but controls the policy." Judge Duer (i. 245) gives the weight of his authority in favour of the distinction drawn by Mr. Justice Buller, and proceeds in these words, "Where the words to be interpreted are indeterminate or ambiguous, the usage *explains* them; but when they convey a definite meaning that the Court would be bound to adopt, or their construction has been settled by law, the usage *controls* them; and in these cases it does *set aside* what, judging alone from the terms of the policy or the rule of the law, was the plain intention of the parties; but, in controlling, the usage does not contradict the words—it merely varies by extending or enlarging their application." It is in practice often extremely difficult to distinguish between the *control* (or *modification*) of a policy by a usage of the special trade it refers to, and the *contradiction* of a policy by the same usage. The case of *Brown* v. *Carstairs*, 1811,[3] is in point. It was formerly the usage at Archangel to seal down a vessel's hatches immediately on her arrival, and put a custom-house officer on board until the goods were discharged and conveyed to a government warehouse, where they remained until the duty was paid. A merchant insured his goods from London to Archangel until they should be there discharged and safely landed. It was held by Lord Ellenborough that no action lay against the underwriter for any loss occurring after the sealing of the hatches and boarding of the revenue officer, "for the goods were then landed, according to the usual course of trade at Archangel, which was all the underwriter undertook for." The point that occurs to most readers of this decision is that here control has come very near to contradiction, and it is difficult to reconcile with this the view of Judge Duer that the

[1] 4 Dougl. 28. [2] 4 Dougl. 276.
[3] 3 Camp. 160; Arnould, p. 75.

usage in controlling does not contradict the words, but merely varies, by restraining or enlarging, their application (i. 246). For in what plainer and clearer words than those employed in the policy could the merchant have described his intention of insuring the goods until after actual discharge and actual (not customary) safe landing? It would appear from Lord Ellenborough's decision that nothing would have been of any avail short of an explicit exclusion from the contract of a usage which is only implicitly contained in it.

Most of the cases on usage cited in the books are old, some of them almost antique. The reason is that the opening up of steam trading routes has resulted in a great modification, in many cases an almost entire destruction, of custom of particular places and trades. Whatever be the fault of our present commercial *régime*, it is certainly one of much more uniform commercial practice than any heretofore. Besides, warned by repeated decisions of the courts, the parties to the marine insurance contract have tried to express in special clauses or definitions more accurately than of old the precise limits and extent of the risks offered and accepted, and in consequence have given more clearness and definiteness to the contents of the contract.

(2) *Context.*—As the contract of insurance is *one* contract, it is evidently reasonable to expect that the various parts of it shall tend to *one* end. Consequently, the plain or literal meaning of the words having been once ascertained, it remains to be seen whether the purport of each clause does or can be made to agree with the general scope and intent of the whole document. In the explanation of the general words ("all other perils, losses, and misfortunes") mention was made of the case of the *Inchmaree*, (*Hamilton* v. *Thames and Mersey Marine Insurance Company*, 1887),[1] in which an attempt was made to claim under these words the cost of repairs to a donkey boiler, where the occurrence of the damage itself was the only thing of the nature of a peril. It was laid down most distinctly that the courts would not include under the general words any occurrence not

[1] L.R. 12 App. Cas. 484.

of the same class (*ejusdem generis*) as the perils enumerated in the policy. Any other interpretation was held to be outside the general scope and intent of the policy.

On the other hand, while the sphere of the policy itself is thus restricted, the marginal clauses which are in special cases added to the policy are treated in another way. It is always considered that as they are special additions to the policy they form the subject of an agreement more detailed and particular than the general agreement to insure contained in the policy. The rule given by Lord Ellenborough in *Robertson* v. *French*, 1803,[1] is that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning." As Judge Duer pointedly puts it (i. 166), the printed words "may not express the intentions of the parties," the written words "certainly do." There is thus a gradation in the effect to be given to the different parts of the contract. Subject to the general conditions of a marine insurance contract, the terms of the contract are interpreted with increasing strictness—technical or literal as the case may be—according as they are embodied in—

(1) The body of the text of the policy.

(2) Marginal printed clauses.

(3) Printed or stamped clauses impressed or attached to the policy.

(4) Clauses written on the face of the policy.

There is, in fact, a progress from a stereotyped form employed in all cases, through forms intended for the reduction or increase of the risks contemplated, and those applicable to special trades or classes of risks, to words and clauses arranged and constructed with special reference to the individual risk in point.

It is on the same principle that a greater strictness of construction is applied to clauses and stipulations which

[1] 4 East 130.

the parties themselves have introduced than to customary forms of expression, whether contained in the text of the policy or in marginal, attached, or written additions. From this follows the rule that if what is written conflicts with what is printed, it controls what is printed.

The policy being a contract of indemnity to the assured it is to be construed liberally in his favour; he no doubt wanted as full indemnity as was obtainable, and the underwriter probably "means that he shall understand the indemnity given to be as extensive as its terms upon any fair consideration import." The application of this principle results in two rules of practice:—

(1) The provisions of the text and clauses of the policy in favour of the assured are throughout taken to be cumulative and not restrictive or exclusive of one another. In other words, extra clauses added to the policy with the intention of adding to the extent of the assured's indemnity are not allowed to deprive him of any indemnity he may have under the original text. For instance, in *Hagedorn* v. *Whitmore*, 1816,[1] the existence of a special clause dealing with the payment of damage to linens was not allowed to deprive the assured of a claim for damage which he had on the policy in the ordinary printed form (Marshall, 229).

(2) Any ambiguity in an exception to, or restriction of, the terms of a policy is taken in the sense least favourable to the underwriter. The ground for this apparently hard treatment of the one of the parties to the contract is given by Chief Justice Cockburn in *Notman* v. *Anchor Insurance Company*, 1858,[2] namely, "the policy being the language of the company must, if there be any ambiguity in it, be taken most strongly against them."

The Doctrine of Proximate Cause

Any discussion of the principles of interpretation of a policy is imperfect that leaves unmentioned the doctrine of proximate cause, *causa proxima*. It is a doctrine the application of which is not confined to insurance, although it is perhaps more heard of in this connection than in any other. The doctrine is embodied in the maxim, *Causa proxima non remota spectatur* (the immediate cause and not the distant one should be regarded). In fulfilment of this maxim it has become a settled rule "that the underwriter

[1] 1 Stark 157. [2] 4 C.B. N.S. 481.

is liable for no loss which is not proximately caused by the perils insured against" (Arnould, p. 788). Lord Bacon gave it as the reason for the prevalence of this maxim that "it were infinite for the law to consider the causes of causes, and their impulsions one on another, therefore it contenteth itself with the immediate cause." It is a misfortune that people have learnt to talk and write not of *immediate* cause, but of *proximate* cause; the use of Bacon's wording would likely have prevented the existence of definitions of proximate cause which ignore the essential characteristic, immediateness of sequence.

It is right to remark that there is not complete unanimity in the regard in which the doctrine is held; most authorities state it as a leading principle, while Phillips, for instance, is hardly inclined to treat it so seriously. He says:—

> § 1132. The commonplace maxim, that in cases of doubt to which of two or more perils a loss is to be assigned, *causa proxima non remota spectatur*, has been not unfrequently resorted to, by which was meant, originally at least, that a loss is to be attributed to the peril in activity at the time of the ultimate catastrophe, when the loss is consummated. But much of the jurisprudence is contradictory to the maxim taken in this sense, and it seems to have served rather to direct attention from the proper inquiry and to becloud instead of elucidating the subject."
>
> "I understand the results of the jurisprudence to be that—*In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril whether it is or is not in activity at the consummation of the disaster.*"

Without knowing exactly what is meant by the words "consummation of the disaster" it is impossible to say whether this interpretation really represents the result of the cases in the English and American law reports.

The best way to bring out the meaning of the maxim is to show how it has been applied in practice in actual cases.

Take the instance of a ship confessedly damaged by the perils of the seas, so that the underwriter is liable for the cost of the repairs in the proportion which the amount he has insured bears to the value given in the policy. This payment for the material damage does not cover the shipowner against all the loss he has sustained, for there is another loss to the shipowner resulting from the ship not being able to earn freight during the period of repairs. This secondary loss is not recoverable from the underwriter, *not being the immediate result of the accident that produced the damage.* This should be compared and contrasted with the position taken up by one shipowner claiming from another payment of the damages, etc., caused by collision resulting from the fault of the other ship. In that case there is added to the cost of the repair of the material damage a charge for the loss sustained by loss of employment during the time occupied in the repairs (*demurrage*); in fact, in collision suits this item is often the most important part of the claim.

Similarly, in the case of cargo, in *Powell* v. *Gudgeon*, 1816,[1] where a ship disabled by perils of the sea put into port to repair, and the master was obliged to sell some of the cargo to pay his expenses, it was held that this was not a loss by the perils of the sea, though they were the remote cause of it, the proximate cause being the want of funds to pay for the repairs (Marshall, p. 492). On the same principle, in case the master of a vessel belonging to a foreign owner (whose liability is limited to the value of his vessel), incurs outlay on behalf of the whole venture which is in the end found to exceed the value of the ship when sold, if the cargo-owner has in consequence to bear a loss, this loss is not one for which the underwriter of cargo against sea perils is liable. The immediate cause of the cargo-owner's loss was not any peril of the sea or any other peril enumerated in the ordinary English form of policy, but the limitation by foreign law of the liability of the shipowner to the value of his vessel.

In the case of the tug *Rosa* (*Reischer* v. *Borwick*, Court

[1] 5 M. & Sel. 431.

of Appeal, 2nd and 3rd July 1894),[1] Lord Justice Lindley in his judgment made the following statement: "There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard 'proximate' and not 'remote' causes of loss. This rule is based on the intentions of the parties as expressed in the contract into which they have entered, but the rule must be applied with good sense, so as to give effect to, and not to defeat those intentions." The existence of personal fault of the assured among the remote causes of loss or damage has been held to exempt the underwriter from claims for loss or damage even if immediately caused by perils insured against. In the case of *Thompson* v. *Hopper*, 1856,[2] a vessel was with the deliberate *knowledge*, one might say by the wilful act, of her owner sent out of port into a roadstead without proper preparation for sea. As she lay anchored in an exposed position a gale came on, she was driven ashore and became a total wreck. It was acknowledged that the gale, a sea peril, was the immediate cause of the loss, but as the ship was knowingly left unprepared, it was held that the assured could not recover, as otherwise he would really be deriving advantage from his personal misconduct. This case should be contrasted with *Dudgeon* v. *Pembroke*, 1877,[3] on a policy of insurance for time on a vessel bought after being out of work for a while, and fitted up by the new owner for his special trade without sparing expense or trouble. She sailed from London to Gothenburg in Sweden, and arrived there, although on the passage she made more water than was expected. On the return voyage in a gale she began to leak, and becoming full of water did not answer her helm. In consequence of this and of fog and of the gale she went ashore on the Yorkshire coast and went to pieces. The jury found that had the vessel been seaworthy she would not have gone ashore or been wrecked: that unseaworthy though she was, she would not have been lost had it not been for the gale: that her unseaworthiness was a latent defect arising from no fault of the owner. It was held in

[1] 10 Times Law Rep. 568. [2] 6 E. & B. 172, 937.
[3] L.R. 2 App. Cas. 284.

the Court of Queen's Bench and the House of Lords that the underwriters were liable. The words of Lord (then Mr. Justice) Blackburn are eminently worthy of attention:

> "The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, namely, her being in distress and full of water, was that when she laboured in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss."

In both of these cases the immediateness of the results from perils of the sea is evident. What prevented the recovery of the amount insured in *Thompson* v. *Hopper*[1] was not the remoteness of the cause, but the personal fault of the assured. Further remarks in the judgment of *Dudgeon* v. *Pembroke*[2] lead to the conclusion that if a similar loss had occurred through tear and wear aggravated by the original bad state of the vessel,[3] Mr. Justice Blackburn would have held the underwriters exempt from the loss.

These decisions lead to the conclusion that in cases of ships insured on the ordinary form of policy, what has to be done is to determine the immediate, the very last cause of the loss or damage, in the way Mr. Justice Blackburn did in the extract cited above: if this very last cause is one of the perils insured against, then the loss or damage is due to be

[1] 6 E. & B. 172, 937. [2] L.R. 2 App. Cas. 284.

[3] This is practically what the arbitrator found to be true in the case of *Fawcus* v. *Sarsfield*, 1856, 6 E. & B. 192.

paid by the underwriter, unless there is among the more remote causes personal fault of the assured, simple tear and wear, or unseaworthiness. But the negligent navigation as distinguished from the wilful act of an assured does not diminish the liability of underwriters for a loss of which the proximate cause is a peril of the sea.[1]

In the more complicated cases where a vessel is insured against only some of the perils named in the policy, and the loss occurs jointly from a peril specifically insured against and one or more of those not insured against, the same difficulty arises in a more pointed form. As an illustration one may take the imaginary case put by Chief Justice Erle in *Ionides* v. *Universal Marine*, 1863:[2]

> "Suppose the ship, insured free from all consequences of hostilities, is going to a port where there are two channels, in one of which a torpedo has been laid by the enemy. If the master not knowing this goes into the channel where the torpedo is, and is blown up, this is within the exception:[3] not so, if knowing of the torpedo he takes the other channel to avoid it, and by unskilful navigation runs aground there."

In the case then under C. J. Erle's consideration, a coffee-laden ship struck a reef of rocks and became a wreck, in consequence of the captain losing his reckoning owing to Cape Hatteras light being extinguished for strategic reasons by the Confederates in the American Civil War. There were 6050 bags of coffee on board, of these 1020 would have been salved but for the intervention of the Confederate troops, who, however, saved 170 for their own use. It was decided that the underwriters who insured the coffee "free from all consequences of hostilities" were not liable for the loss of the 1020, but were liable for that of the remainder 5030. The 1020 were certainly lost in consequence of hostilities, but the 5030 from perils of the sea, namely from

[1] The Gainsborough (*Trinder* v. *Thames & Mersey*, Ct. Appeal, 4 May 1898), 14 Times L.R. 386.

[2] 14 C.B. N.S. 259.

[3] That is, the underwriter would in consequence of the clause "free from all consequences of hostilities" be held free from all liability for the loss.

striking the reef, which was not by any means an inevitable
Addenda. or even a usual consequence of the extinction of the light.

In the case of the tug *Rosa* already referred to (*Reischer* v. *Borwick*, Court of Appeal, 2nd and 3rd July 1894),[1] the risks insured against in the policy were "the risk of collision (as per clause attached) and damage received in collision with any object, including ice." The collision clause attached refers to collision with other ships; the accident that did occur was collision with a snag in the Danube. The damage was serious; the captain endeavoured as speedily as he could to plug up the vessel from the outside, and took the assistance of a tug to tow his vessel to a place where she could be repaired. During the tow one of the plugs fell out, and in order to prevent the vessel from sinking in deep water, the tug towed her on to the southern bank of the river. The underwriters paid cash into court for the damage sustained up to the time when the *Rosa* was taken into tow, but denied liability; with respect to the subsequent damage, they strenuously contended that they were under no liability on the ground that the proximate cause was not the collision, but the towing to a port of repair. Mr. Justice Kennedy overruled this contention, and the Court of Appeal (Lords Justices Lindley, Lopes, and Davey) confirmed his view. Lord Justice Lindley said: "The sinking of the ship was proximately caused by the internal injuries produced by the collision, and by the water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to the one of these causes as to the other; each was as much a 'proximate' cause of her sinking as the other, and it would in my opinion be contrary to good sense to hold that the damage by the sinking was not covered by this policy. . . . I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed, it is comparatively easy to distinguish them and to have their respective effects, but under other circumstances it may be impossible to do so.

[1] 10 Times Law Rep. 568.

It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury, *i.e.* under circumstances which, but for the existence of that injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of the loss—the *causa causans* and not the *causa sine qua non*."

From consideration of all the cases mentioned above, it appears that there is some difference between the treatment of excepted perils and that of default of owner, wear and tear, and unseaworthiness. The difference seems to be that the excepted and the covered perils are regarded as of equal importance until it is discovered which is the more immediate cause of the casualty; while in the case of default, wear and tear, and unseaworthiness, any one of these once found existing absolutely wipes out the other coexisting perils and is burdened with all the liability.

There is another important group of cases, *Jackson* v. *Union Marine*, 1873,[1] *Inman* v. *Bischoff*, 1881,[2] and *Mercantile Steamship Company* v. *Tyser*, 1881,[3] in which the subject insured was an expectation of gain, say freight, which was lost through some circumstance like the exercise of a charterer's option to cancel a charter if the vessel does not arrive at loading port by a named date. In all these cases a casualty caused by a peril of the sea occurred, and in consequence of the resulting delay the charterers did not permit the vessels to load the cargo or earn the freight they went to get. The circumstances of the three cases differed widely, but the net result was that where the loss of the opportunity to earn freight was caused solely by the exercise of the charterer's option to cancel, the underwriters on the ordinary policy against perils of the seas were held not to be liable for the loss.[4]

[1] L.R. 8 C.P. 572; 10 C.P. 125.
[2] 7 App. Cas. 670. [3] 7 Q.B.D. 73.
[4] See also *The Abrota*, 1895 (*Jamieson* v. *Newcastle Stm. Frt. Ins. Ass.*), 11 Times L.R. 176 and 416, see also p. 242 below.

CHAPTER IX

TOTAL LOSS OF SHIP AND OF CARGO

THE policy speaks of the underwriter taking upon himself the "burden of this insurance," and binding himself "for the true performance and fulfilment of the contract" therein contained. But the form which the underwriter's liability may assume, and the extent which it may reach, are left without special definition. All that can be gathered from the wording of the policy alone is that the assured is protected by the underwriter from certain named adventures, perils, losses, and misfortunes, and from all others (of the same kind) occurring to the hurt, detriment, or damage of the property insured or any part thereof.

There is nothing to be gained by attempting a theoretical deduction of the forms which this liability must take. The policy has been so modified by additions made to it from time to time that any such deduction would probably be most misleading. It will therefore be more suitable to take up the different forms of liability that have been found in practice. There is one form which must from the first have presented itself as indubitable, namely, total loss arising from any of the perils named in the policy.

Total Loss, Actual and Absolute.—Suppose a vessel leaves port on a voyage to San Francisco; some weeks after, the crew of this vessel are landed from another ship, and make a declaration that their vessel took fire in a particular position on a named day, that after being compelled to leave her in their boats they saw her explode and go down, that they were picked up by the rescuing ship so

many days after. If this declaration agrees with what else is known of the picking up of the crew, and is otherwise credible and trustworthy, there can be no doubt that "the burden" of an insurance covering fire will properly include losses of this class.

Similarly, suppose that a vessel leaves port properly equipped for a voyage, which on the average lasts three months; at the end of six months there is no news of her arrival at destination, nor any report of her passing islands or other stations on the track she was intended to take, nor any "speaking" with other vessels following or crossing that track or any in its neighbourhood. Time goes on, inquiry is made for news respecting the vessel; in absence of news of her safety she is formally "posted" as a missing ship. From the circumstances there can be no actual proof of the cause of loss; but as she left port a stout, strong, and staunch vessel fit for her intended voyage, the presumption is that she has perished by some of the perils named in the policy (whether they be of the elements or of man). This, therefore, also constitutes a loss, "the burden" of which should fall on the underwriter issuing his policy against perils of the sea.

Next, a vessel runs against a rocky headland, knocks in her bow, smashes her keel, and breaks up into pieces of iron and timber. What is left of her is no longer a ship, it is not a vessel that can be employed in the transport of goods from one place to another; should the fact of her materials remaining in a kind of existence in mass prevent the disaster from being considered a total loss?

Akin to these "losses and misfortunes" are those that occur when the action of earthquake raising dry ground under ships, or of tidal waves sweeping ships inland, results in their being left high and dry up a mountain side or hundreds of yards from sea-board. They are in these positions quite unavailable for the performance of the work they were intended for; as far as the owner's intended employment is concerned they are as much taken out of his possession and control as if they had been seized by pirates or run off with by a barratrous captain or mutinous crew.

The few instances given above will illustrate the very full definition given by Phillips.[1]

> "§ 1485. A total loss of a subject is when by the perils insured against it is destroyed or so injured as to be of trifling or no value to the assured for the purposes and uses for which it was intended, or is taken out of the possession and control of the assured, whereby he is deprived of it; or where the voyage or adventure for which the insurance is made is otherwise broken up by the perils insured against."

The last paragraph of this definition will be the subject of closer consideration when losses of cargo and of hire for carrying cargo are discussed.

The instances of total loss given above are so evident and uncompromising that they are properly described as actual total losses, or actual and absolute total losses. There is either nothing left of the ship at all, or nothing left in the possession and control of her owners, or only something that is of no value to the assured for the purposes and uses for which it was intended.

Constructive Total Loss.—But although a ship is not totally lost in any of these evidently uncompromising ways, she may still be a total loss. It has often occurred that a ship having run on rocks has sustained damage to her bottom, but sits upright in the water so that at a little distance she seems to a landsman's eye uninjured, or not seriously damaged. But the owner sees that in all probability she will never come off as a ship; that she may pound and grind herself over the rocks, but likely only to sink in deep water a mass of iron and timber; and that even if she is taken off as she is, the cost of repair will be so great as to render the taking of the vessel off a failure in a commercial sense.

In such a case the owner usually proceeds to give notice of abandonment (or to tender abandonment) to his underwriters. He in effect says: "My vessel is totally lost; pay me the amount for which you have insured her for me and I will transfer to you what remains of the property you have

[1] See *Cossmann* v. *West*, 1887, Privy Council, 6 Asp. Mar. L. C. 233.

insured." If the underwriters accept the view propounded by the shipowner, or if after further progress and examination the owner turns out to be correct in his view, the total loss thus occurring is termed a "technical or constructive total loss," that is, a loss not materially and actually, but only so regarded technically and by construction of law. There is no compulsion upon the owner to take the step of tendering abandonment; if he prefers he may await the result of efforts made to save the vessel, or even wait to see what the vessel's condition is when she comes to be examined for repairs. But by so doing he may completely alter his legal position; he may deprive himself of the possibility of claiming as a matter of legal right from his underwriters the payment of a total loss. If he awaits an examination of the ship with a view to repairs, he has to abide by its result, and take his indemnity in accordance therewith (*Roux* v. *Salvador*, 1836, per Lord Abinger).[1]

Abandonment and Notice of Abandonment.—In the consideration of constructive total loss it thus becomes necessary to discuss abandonment and notice of abandonment. These are two wholly distinct things[2]; abandonment is a positive transfer of property, notice of abandonment is a declaration of intention to make such a transfer. It is not by English law put into the power of the assured to say, "Here, take my property, give me the amount for which you have assured it for me." All he can say is, "I give you notice that in consequence of such and such circumstances I now make my election and declare my intention to transfer my interest in what I have insured with you, demanding in return the sum insured, and here and now I make you the offer of this transfer." The implied meaning of the tender of abandonment is that the venture is in effect totally lost. Consequently the owner ought to tender abandonment as soon as he has such definite intelligence as will enable him to make up his mind that it is reasonably certain that the venture will in effect be totally lost. If he

[1] 3 Bing. N.C. 266. See below, p. 159.

[2] Blackburn, J., in *Rankin* v. *Potter*, L.R. 6 H.L. 83 at 118, quoted by Lowndes, M.I. 153, note *q*.

delays past that time, then all that he does may be reckoned up against him as testimony of his unwillingness to tender abandonment at the proper time, and he may in consequence have to be satisfied with some form of indemnity that does not confer on him the payment of a total loss against the transfer of the property, but leaves him with that property repaired, so as only to be as good as it was before the accident causing the damage.

If the underwriter on receiving the notice or tender of abandonment accepts it, the abandonment takes effect and the property passes to him from the moment of tender, the consideration for the transfer being the payment of the sum insured. If the underwriter desires to accept abandonment he should notify this at once on receipt of the tender. If he returns no answer he must be taken to have declined to accept; this was settled in the case of *Provincial Insurance Company of Canada* v. *Leduc*, 1874.[1]

If the notice of abandonment to the underwriter has not been accepted, there is a possibility of neither assured nor underwriter taking steps to save the imperilled property; neither may be inclined to act in such a way as may be held to indicate an assumption of ownership which each wishes to disclaim. This is the reason of the existence of the "waiver clause" already mentioned (p. 120), by which it is "expressly declared and agreed that the acts of the assured or assurer in recovering, saving, and preserving the property assured shall not be considered as a waiver or acceptance of abandonment." That is, the commencement or continuation by the assured of operations intended to preserve the insured property shall not be deemed to indicate a withdrawal of any notice of abandonment which he may have tendered; nor shall the commencement or continuation of operations by the underwriter be deemed to indicate that he regards the insured object as his property, and that therefore he must have accepted the abandonment.

If, on the other hand, the assured's tender of abandonment has been accepted, the abandonment is definitely

[1] L.R. 6 P.C. 224.

operative as regards both assured and underwriter; each of them has exercised his option and must abide by the consequences.

No particular form has been prescribed for tender (or notice) of abandonment; it is not even necessary that it should be given in writing, although it is usually so given. The reason for this evidently is that it is convenient to have documentary evidence of the tender of abandonment. But in whatever form it is given, one essential is that it be given unequivocally; no condition may be attached; it is an absolute offer then and there. As Lord Ellenborough put it in *Parmeter* v. *Todhunter*, 1806,[1] "The abandonment must be direct and express, and I think the word *abandon* should be used to make it effectual." It is advisable that the tender of abandonment, whether oral or written, should contain or have attached to it some statement of the grounds on which the tender is made, or some reference to the intelligence which has prompted the action of the assured.

As the tender of abandonment must be unconditional and unequivocal, so must the reply in which the underwriter accepts be unconditional and absolute. If he means to decline, there is, as has already been explained, no need to send any reply; but in case of an oral tender, it would be difficult to keep that silence in reply which would of itself constitute refusal. But if the underwriter does commit himself to writing a refusal of abandonment, he would do well to be sure that the form he employs is unconditional and unequivocal.

The word "abandonment" is one of great force. To appreciate this fully, suppose that a ship belonging to an owner who insured absolutely nothing on hull or freight, got into such bad weather that she was seriously damaged and was driven ashore and severely strained. Suppose that she came off next tide without needing any assistance and that she was beached by her own crew in a place of safety,[2] in what circumstances would an uninsured shipowner, exer-

[1] Camp. 542.

[2] To give as simple a case as possible, it is assumed that absolutely no outside help is used; this keeps the matter free from such considerations as those of salvage and "sue and labour" expenses.

cising the ordinary prudence of a business man, leave the ship as she lay to whoever cared to take possession, in fact, literally abandon her? It is evident that it will not pay him to repair the vessel unless her value after she is repaired, *plus* her future earnings on the voyage, exceeds the cost of the repairs. Unless this is the result of his action, then the vessel is to him, the owner uninsured on hull and freight, commercially or technically a total loss; he cannot restore her to her work as a carrying machine for less than her full value when restored.[1]

As regards abandonment by an insured owner, the law has been expressed in several forms. In *Rankin* v. *Potter*, 1873,[2] Lord Blackburn said: "The question between the assured and the underwriters on ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth." Similarly, Chief Justice Tindal in *Benson* v. *Chapman*, 1843,[3] speaks of the "repair necessary for pursuing the voyage insured" constituting "an expense greater than the value of the ship" before the assured is at liberty to

[1] Theoretically it is better put thus: The absolutely uninsured owner will find it more profitable to abandon the wreck rather than repair it, unless

Value of vessel when repaired + freight receivable at end of voyage − cost of repairs *exceeds* Value of wreck as she lies;

i.e. unless

Repaired value + freight *exceeds* Cost of repairs + value of wreck as she lies.

The value of the wreck is generally neglected, probably as being a vanishing quantity, or as being largely reduced by cost of removal to a place of repair; in fact, it is (in the words of Phillips, § 1485) "of trifling or no value to the assured for the purposes and uses for which it was intended." The formula thus becomes

Repaired value + freight *exceeds* Cost of repairs.

See Phillimore, J., in *Gallia*, 1899, 5 Com. Cas. 269; Walton, J., in *Wild Rose*, 1903, 19 Times, L.R. 289, admitting the value of the wreck. *Per contra* Bigham, J., in *Phyllis Angel*, 1902, *Shipping Gazette*, Weekly Summary, 30th May 1902, rejecting the value of the wreck; confirmed by Appeal Court (Mathew, Williams, Stirling, L.JJ.) 1903, 19 Times L.R. 395.

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[2] L.R. 6 H.L. 117.

[3] 6 M. & Gr. 792 at 810.

abandon. On the other hand, Mr. Justice Patterson in *Irving* v. *Manning*[1] puts it thus, "Would a prudent owner uninsured repair?" Mr. Baron Wilde in *Grainger* v. *Martin*, 1863,[2] added, "Or rather would he sell unrepaired?" If by "prudent uninsured owner" is meant "prudent owner uninsured on hull," then these tests are all the same; if, on the other hand, by these words is meant "prudent owner *absolutely* uninsured," then freight must come into the calculation. It may possibly be urged that considerations of freight ought to have no place in a matter between a shipowner and his underwriters on hull. The main point to observe is that *at this stage* no regard is paid to the insured value. The validity of a claim for constructive total loss is determined simply with reference to actual values for sale (*Irving* v. *Manning*, 1847, House of Lords).[3] But if the correctness of the claim is once established on this ground then the insured value comes into play as being the statement of the amount of indemnity for the loss in question, to be furnished by the underwriter.

Constructive Total Loss: Foreign Law and Practice.—The matter of constructive total loss is one which has greatly exercised shipowners, underwriters, jurists, and legislators in all European countries and in the United States. There are points of difference between the law of these countries and the English law on the subject. One of the most striking of these is that in the United States "a damage over 50 per cent of the value of the vessel when repaired is a constructive total loss of the vessel in case of the policy containing no express provision to the contrary" (Phillips, § 1539). By the law of France and Italy loss or deterioration of the objects insured to the extent of three-fourths constitutes a claim for constructive total loss; the law of the German Empire as to ships is the same as French law in this matter. There is one remarkable point of agreement of the American, English, and German systems, namely, that in all three no account whatever is taken of insured value in determining whether a loss is a constructive total loss, or

[1] H. of L. Cas. 817. [2] 4 B. & S. 9. [3] 1 H. of L. Cas. 817

until after the loss has been found to be constructively total, but that as soon as that conclusion has been reached, the insured value is applied as deciding the indemnity to be paid by the underwriter.

Valuation Clause.—The result of excluding insured value from consideration in determining whether there is a constructive total loss on an ordinary policy on ship is frequently found to be that in consequence of the lowness of the price which would be obtained for a ship after repair she is condemned as commercially irreparable, when, in fact, the damage done to her is actually small. In consequence of cases of this nature, valuation clauses of the kind described on p. 75 have been devised. The form there given,

> The valuation stated herein shall by mutual consent in all questions under this policy be taken to be the value of the vessel,

is not only awkwardly arranged, but also fails to touch the point desired. Whether any loss is a constructive total loss is not a question under the policy, as its solution is reached quite independently of any reference to the policy, whose provisions and valuation come into effect only after that question has been answered.

The next step was to frame a clause really meeting the case, and the following was recommended by Lloyd's and adopted by many underwriters and companies :

> It is hereby agreed that the vessel shall not be deemed a constructive total loss unless the estimated cost of repairs would exceed the insured value.

The defect of this form is that it creates a criterion of constructive total loss different from that laid down by the law of England ; the results of this contract and of that enforced by the law in absence of such an agreement may be the same, and, no doubt, in many cases are the same, but that is only the result of accident. As English law introduces only three factors in the determination of constructive total loss, namely, value after repairs, freight and cost of repairs, any clause intended to bring insured value into practical effect in such determination ought to contract for its introduction in one of these factors. This is attained

by the use of a valuation clause of the following wording, which is now generally adopted throughout the country :—

The insured value shall be taken as the repaired value of the vessel in ascertaining whether there is a constructive total loss under this policy.

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Freight of Ship which has become a Constructive Total Loss.—In determining whether a loss is a constructive total loss, the freight of the current voyage is introduced as a factor. When abandonment is accepted it results in an absolute transfer of the ship and all the engagements she has. This includes the transfer of any freight to be received for work in which she was engaged when the transfer occurred.[1] Consequently, if underwriters after accepting abandonment manage to complete the venture in which the vessel was engaged they are entitled to the freight earned by carriage on the abandoned ship. There are difficulties connected with such cases. One of these arises when a shipowner in this way surrenders pending freight to an underwriter of ship, and the freight is thereafter actually earned by the abandoned ship ; the shipowner does not acquire any right of recovery against his underwriter on freight, the ground being that there was no loss of freight by the perils insured against (*Scottish Marine Insurance Company* v. *Turner*, 1853, House of Lords).[2] In *Hickie* v. *Rodocanachi*, 1859,[3] it was decided that when a ship is condemned at a port of refuge, and the freight is earned by a substituted ship, the underwriter on the first ship is not entitled to any part of that freight.

Constructive Total Loss of Cargo.—With respect to goods, there is no need to repeat the obvious cases of absolute total loss either by manifest peril insured against or by the carrying vessel becoming a missing ship. But one form of total loss is more striking in the case of goods than of ship. Among the instances of total loss of ship

[1] As to what freight is to be received, see Mr. Justice Bruce in *Red Sea*, (Adm. 5th July 1895), P. 293, confirmed by Ct. Appeal (14th November 1895), 12 Times L.R. 40.

[2] Macqueen's H.L. App. 342. See also *Thompson* v. *Rowcroft*, 4 East 34 (Maclachlan's *Arnould*, 6th ed., pp. 1074, 1084).

[3] 28 L.J. Ex. 273.

one was given of a ship being so battered by winds, waves, and rocks that in the end it was no ship at all, but only a heap of iron and timber. To use technical language the property insured had *changed its species*, it no longer remained the kind of thing it was at the commencement of the venture. Such losses are of great importance in the case of insurances on cargo. In the case of *Roux* v. *Salvador*, 1836,[1] a parcel of hides was insured from Valparaiso to Bordeaux. The ship sprang a leak and put into Rio, where it was found that the hides were rotting so quickly that they would certainly not reach Bordeaux as hides at all, but simply as a mass of putrefied matter. The master of the ship sold the hides at Rio, and the loss was held to be a total loss less the net proceeds accounted for by the master. Similar cases might occur in which by perils of the sea, grain, sugar, or fruit received such damage that they no longer remained grain, sugar, or fruit, but became utterly changed in their character. It appears that the principle of *Roux* v. *Salvador* might equally apply to such cases. Yet in some such cases such a proceeding might come dangerously near paying for *vice propre* or inherent quality of the goods. For supposing that some chemical was insured, say some powder which solidified when combined with sea-water, it is quite clear that with imperfect packages a large amount of irreparable damage might be done which would not have occurred in an article of different constitution like flour.

The last words of Phillips' definition of a total loss are "or where the voyage or adventure for which the insurance is made is otherwise broken up by the perils insured against." It is hard to see how these words can be applied to ships, but in the case of goods or of the hire paid for the carriage of goods it is manifest that where perils insured against effect a "destruction of the contemplated adventure" (Lord Ellenborough's words in *Anderson* v. *Wallis*, 1813, and *Barker* v. *Blakes*, 1808; quoted by Baron Bramwell in *Rodocanachi* v. *Elliott*, 1873),[2] there may be reasonable ground

[1] 3 Bing. N.C. 266.
[2] 2 Asp. Mar. L. Cas. 399; L.R. 8 C.P. 649.

for the assured asking for indemnity from his underwriter. Such destruction of a contemplated venture might occur in many ways: goods might be detained in a port for a long period without any hope of early release so as completely to frustrate all the commercial ventures connected with their purchase and contemplated sale. This was the case in the matter of *Rodocanachi* v. *Elliott*[1] regarding goods detained in Paris during the siege of 1871. Or it might happen that the vessel carrying the goods in question stranded at a point far from any possible assistance: the crew might be able to save some cargo, putting it ashore in a place of safety, but be unable to remove it to a port from which it could be sent on to destination. The goods would thus lie perfectly safe but unattainable. This appears to be a fair case of loss of venture and consequently of constructive total loss of cargo.

Addenda

Again, if a voyage has been in some way interrupted by perils insured against, it may happen that damaged cargo is discharged at some point *en route*. If the original ship is unable to prosecute her voyage it becomes a question whether the goods can be forwarded without a loss being incurred on them. If there would be a loss, in case the goods were reconditioned, reshipped and forwarded, that is, if on arrival at destination the goods were not worth the amount of these various expenses, it is plain that there is something like a constructive total loss on the goods. On this point there are several important decisions; one of them (*Farnworth* v. *Hyde*, 1866)[2] has given rise to a good deal of discussion, owing to the discovery of what seems a mistake in an elementary sum in addition and subtraction.

What would a prudent uninsured owner of goods do in such a case? If he has goods lying damaged at an intermediate port or place, what will he do? will he arrange to bring them on, or will he literally abandon them as they lie? His choice will certainly depend on the cost of bringing them on to destination. The first item to consider

[1] 2 Asp. Mar. Law Cas. 399, L.R. 8 C.P. 649.
[2] L.R. 2 C.P. 204.

is the cost of reconditioning, then follow the expenses of reshipping and the freight. If the expected value of the goods at destination does not amount to the sum of these items, it is evidently commercially unreasonable to expect the merchant to bring on the goods, it is evidently better to sell them as they lie for any price they will fetch.

Suppose that the same merchant were insured, under what circumstances should he be entitled to claim a constructive total loss from his underwriter? There would seem to be no doubt that such a claim can be justified in case the value of the goods taken as arrived at destination with all charges paid is nothing, or, in other words, when the price obtained for goods if sold at destination after payment of all charges does not exceed the amount of the charges. The question arises whether the freight per bill of lading is one of the charges that should be taken into the calculation.

The case of *Farnworth* v. *Hyde*, 1866,[1] was one against the underwriters of a policy on a cargo of timber from Quebec to Liverpool. It was proved that the ship was frozen up in the St. Lawrence at the beginning of winter, and in the spring she was, under the advice of competent surveyors, sold, as it was considered that the expense of repairing and forwarding would be greater than the value when repaired. No notice of abandonment was given: the news of the disaster and of the sale arrived at the same time. The jury in the Court of first instance found the sale justifiable, and a verdict was entered for the assured as for a total loss. The Court of Common Pleas, on a rule to enter non-suit, held (Mr. Justice Byles dissenting) that there was evidence to show that the probable loss during the operation of saving and forwarding would have absorbed the surplus profit, and that the verdict for a total loss ought to stand even without abandonment. In estimating what would have been the value of the cargo had it arrived at Liverpool, the original bill of lading freight £1556 was deducted; had not this been done, there would have been a margin of profit of £1700.

[1] L.R. 2 C.P. 204.

This point was brought to the notice of the Exchequer Chamber by Mr. Justice Blackburn, and in consequence it was held that this freight ought not to have been deducted to get at the value of the cargo as arrived at destination. In the words of Baron Channell's judgment: "They ought not to take into account the fact that if the goods are carried on in the original bottom, or by the original shipowners in a substituted bottom, they will have to pay the freight originally contracted to be paid, *that being a charge to which the goods are liable when delivered, whether the perils of the seas affect them or not.*" On this principle the judgment proceeds to state that in case the original shipowner determines not to carry on the goods either in the original or in a substituted bottom, the cargo-owner, if he brings them on, is not entitled to take into account the whole of the amount he pays for forwarding, but *only the amount by which that exceeds the original freight.* The effect of this, put briefly, is that unless the *extraordinary* expenses incurred in consequence of perils of the sea or other perils insured against exceed the arrived gross value of the cargo delivered at destination (*i.e.* of course with freight paid) the assured is not entitled to abandon.

This result is quite different from that at which we arrived when we considered the action of the prudent *uninsured* owner. He would abandon the goods if their expected gross price did not exceed the freight *plus* the extraordinary expenses; while the law does not give the *insured* owner any right to tender abandonment to his underwriter unless the expected gross value does not exceed the extraordinary expenses alone, Lowndes (Law M I. p. 137) and M'Arthur (Contract M. I. p. 151, note) both regard this difference as the result of a mistake or fallacy into which the judges fell. So it certainly is, if it is correct to assume that the result in any question of policy or practice in the relations of assured and underwriter must accord exactly with the result of the course which would be adopted by a prudent uninsured owner.

But is this assumption justifiable? If A, while retaining certain of his own obligations with their corresponding

privileges and rights, delegates some to B and others to C, the result of the operation of each separate set of delegated obligations and rights does not of necessity coincide with that of the whole sum of A's original obligations and rights. This is really the principle underlying Baron Channell's judgment: he examined separately the relations of the cargo-owner to the shipowner and then to the cargo underwriter.

As to the shipowner, as long as the cargo is delivered *in specie* at destination the freight is due to him by the consignee in whatever state of damage the cargo is delivered, provided the damage has arisen from perils excepted in the bill of lading.

As to the cargo underwriter, it is possible that before the cargo can be offered for sale at destination for any sum worth mentioning, expenses have to be incurred in reconditioning the goods. This class of expenses was dealt with in *Rossetto* v. *Gurney*, 1851,[1] and *Reimer* v. *Ringrose*, 1851.[2] The judges intimated to the assured: "The obligation or risk transferred by you to your underwriters includes nothing but the consequences of the perils enumerated in the policy; liability to pay freight at destination is not one of these, so no consequence of that obligation can be transferred to your underwriter." It appears to have been on this ground that Mr. Justice Blackburn raised the question of freight in the Exchequer Court in *Farnworth* v. *Hyde*, 1866.[3] The reasoning seems to be (at least) as little fallacious as the opposite doctrine that the position of an underwriter towards his assured is always to be determined commercially by the course which would have been adopted by a prudent uninsured merchant or shipowner. To put it in few words: the underwriter never guarantees that cargo will be worth its freight whether it arrives damaged or sound, why should a freight obligation be imported into his contract in certain cases of damage and loss when it is really a part of the merchant's obligations which the merchant retains at his own risk in case of arrival

[1] 11 C.B. 176. [2] 6 Exch. 263.
[3] L.R. 2 C.P. 204.

of his goods at destination? Considerations of a similar kind arise again and again in the treatment of cargo claims; but this instance seems to make it clear that the *prudent-uninsured-owner* theory is not adequate to the solution of several important problems in marine insurance.

Constructive Total Loss: when determinable?—It was said above (p. 147) that if the assured instead of tendering abandonment awaits an examination of his property with a view to repairs, he has to abide by the result of such examination and take his indemnity in accordance therewith. But what constitutes indemnity in such a case? Is the liability of the underwriters determined by the state of matters as they existed at the time when abandonment was tendered by the assured, or when action was instituted against the underwriter? In the case of *The Sailing Ship Blairmore Company* v. *Macredie*,[1] it has been decided that to determine whether a loss is constructively total or merely partial, account must be taken of such expenses as the underwriters may incur between the dates of proper tender of abandonment and of action brought, in rescuing the property and taking it to a place of safety. Lord Herschell stated the general rule of English law to be that if, in the interval between the notice of abandonment and the time when legal proceedings are commenced, there has been a change of circumstances reducing the loss from a total to a partial one, the assured can only recover for a partial loss. But he added that this rule had never been applied to a change brought about by the underwriter. He considered that to extend it to such a case would be unreasonable and would not give due effect to the contract between the parties. Lord Watson in his judgment remarked, "I have been unable to arrive at the conclusion that, in the circumstances which occur in this case, the consideration of what would be the action of a prudent owner uninsured affords the true test of the liability of the underwriters as for a total constructive loss. In my opinion that test is excluded by the contractual relations which exist between the insured and his insurers."

[1] House of Lords, 1898, A.C. 593.

CHAPTER X

TOTAL LOSS OF FREIGHT

THE third great maritime interest, freight, remains to be dealt with. The word "freight" does not appear in the text of the policy as it existed before May 1749. It is not easy to see how it came to have its present signification, namely, hire for carrying goods. Etymologically it should mean simply load or cargo, and it is still used in the United States in this sense (*e.g.* freight train, fast freight train, the equivalent of the English goods train and express goods train). But it has lost that meaning altogether in England, and now stands simply for hire for carrying goods, and on the United States' sea-board the word is used in nautical affairs in that sense.[1]

In regard to this interest there is a most important and, in fact, an essential difference between the law of England and that of most other ocean-carrying nations; and this difference has important consequences on the relations of assured and underwriter on freight. English law takes the contract under bill of lading between ship-owner and merchant to be that if the freight is payable at destination, then no part of it is earned by a partial performance of the contract, that is, by delivery of the cargo at any port short of destination. If an English ship takes

[1] In German there is a somewhat similar confusion between *Fracht* and *Frachtgeld*, in Dutch between *Vracht* and *Vrachtpenning;* in Italian the words *nolo* and *noleggio* are those ordinarily used to mean freight, while in French the word *fret* is pushing out *nolis*, and in Spanish *flete* is the only form now in common use.

in cargo at Liverpool for delivery at Calcutta in return for so much freight, delivery of the cargo at Colombo or Madras will not entitle the shipowner to any freight. Almost all the maritime countries except England have adopted a custom entirely contrary to this: they regard the freight as a liability from the cargo accruing as it were mile by mile as the vessel proceeds and culminating at its full bill of lading amount at port of destination on safe delivery. If a German vessel undertook the voyage from Hamburg,[1] and tendered the cargo at Colombo, being herself unable to proceed farther on the voyage, the owner would be entitled, under the law of his flag, to claim the same proportion of the full freight as the distance from Hamburg to Colombo bears to that from Hamburg to Calcutta. This is called distance freight or freight *pro rata itineris peracti.* In this country it has been considered contrary to public policy to permit any such partial and proportionate discharge of a freight contract: it has been thought that such permission might tend to encourage masters and crews to look for reasons to close the freight contract elsewhere than at the intended destination of the adventure. There is certainly good reason for thinking that many condemnations of foreign vessels at intermediate ports of their voyages would never occur were it not for the distance freight.

In consequence of the view of freight adopted in English law, payments made towards freight hold a curious position in English maritime commerce. If the full freight as per bill of lading is, in consequence of some cause or other preventing the ship's arrival at destination, never earned, what becomes of amounts which the cargo-owner may have prepaid? are they recoverable by the cargo-owner or do they remain the property of the shipowner? That depends entirely on the intention of the parties; if the intention is to provide an amount on account of freight as it may ultimately be found to be due, then the prepayment is simply a loan; if, on the other hand, it is meant to be a payment of part of the

[1] See *Industrie*, Shipping Gazette, 30th Nov. 1893.

freight, due when the cargo was loaded, on signing bills of lading or immediately on sailing, then it is a payment to the shipowner absolute and irrevocable, but to be deducted from the bill of lading freight if and when earned. The latter kind of payment is termed "advance freight." If a payment on account is meant to be merely a loan against freight as ultimately due, it should be described in such words as will make its character clear and prevent its being considered advance freight.

To turn to the insurance side of freight, it is plain that when the carrying ship is completely destroyed by any of what may be called the eminent perils (foundering, burning, etc. etc.) there is an end of the carrying power of the ship, and equally an end of what she was carrying, so that in such cases there is what may be termed a "double qualification" of claim for total loss of freight. In his judgment in *Scottish Marine* v. *Turner*, 1853,[1] Lord Truro said: "The expression 'loss of freight' has two meanings, and the distinction between them is material:

"(1) Freights may be lost in the sense that, by the perils insured against, the ship has been prevented earning freight.

"(2) Freight may be lost in the sense that, after it has been earned, the owner has been deprived of it *by some circumstance unconnected with the contract between the assured and the underwriter on freight.* For a loss of freight, in the first sense, the underwriter on freight is responsible; for a loss of freight in the second sense he is not."

Short of such complete total loss, we may have two cases of total loss of freight:

(1) Where owing to perils insured against the cargo is incapable of being carried to destination.

(2) Where owing to perils insured against the ship is unable to carry the cargo to destination.

(1) By "incapable," in the first case, is meant not only physically incapable but also commercially incapable. That is to say, the description covers not only goods

[1] 1 Macqueen's H.L. App. 342.

altered by perils insured against into something different *in specie* from what was shipped or deteriorated so as not to be able to bear forwarding and consequently totally lost, but also goods burdened, in consequence of perils insured against, with such charges as make their forwarding to destination impossible except at a loss, *i.e.* goods which have suffered constructive total loss in the sense already explained.

Suppose that an English vessel has put into a port of refuge for repairs and has discharged her cargo, and that her cargo is found to be in such a condition that it cannot be carried forward to destination with safety to the venture, or so as to be delivered *in specie*, or in any but a worthless state. If this cargo is sold at port of refuge, there evidently has gone with it the right on the part of the ship to obtain a certain amount of freight at the end of the voyage, *i.e.* at destination when reached. The cargo may be sold in this way (*a*) whole, (*b*) in part.

(*a*) If the whole cargo is sold, the possibility of earning any part of the freight has vanished; and if the damage giving rise to the sale has been caused by perils insured against, there will be a claim for total loss on the freight policies, the shipowner not being able to collect any freight from the consignee.

(*b*) When only a portion of the cargo is sold, and the rest is forwarded, the amount of freight due by the consignee is the excess of the bill of lading freight on the portion delivered beyond the amount of advance freight. If the full freight of the delivered portion does not exceed the advance freight the consignee has nothing to pay. This follows from the decision in *Allison* v. *Bristol Marine*, House of Lords, 1876,[1] in which a ship took a cargo of coal from Greenock to Bombay; the charter-party provided that half the freight was to be paid on signing bill of lading, and the remainder on right delivery of the cargo. The vessel was lost before entering

[1] 1 App. Cas. 209.

Bombay harbour, and one-half of the cargo was saved and delivered. It was held that the consignee was not liable to pay anything further for freight, the amount of the advance being enough to cover the full freight of the delivered portion. There was then no loss on the advance freight, but a total loss upon the shipowner's freight at risk, which was recoverable under the policies. Had the wording of the clause in the charter-party dealing with advance freight been that one-half of the freight *of each ton shipped* was to be paid on signing bills of lading, and the other half on right delivery of the cargo, the amount lost would have been the same, but the loss would have fallen equally on the shipowner and on the consignee (or charterer); the shipowner earning full freight on half the cargo delivered (one moiety advance, one moiety on delivery) and recovering from his underwriter the moiety at risk on the half cargo lost, the consignee (or charterer) recovering from his underwriter the moiety advanced on the half cargo lost. It has frequently happened that a vessel is left wholly or partly empty in consequence of an accident at port of loading in which all or some of her cargo is destroyed by perils insured against, *e.g.* fire. The question arises, What would happen if she were to complete the voyage for which she had loaded the cargo, and were to present herself at destination delivering instead of the cargo, proper and adequate proof that owing to such and such perils the missing cargo had been destroyed? There would appear to be a loss of freight by perils insured against. It is doubtful whether such a course would be reasonable, for nothing would be accomplished by the passage of a vessel thus wholly or partly empty except the fulfilment of the voyage for which she accepted cargo, the voyage being completed simply to substantiate a claim against underwriters on freight.

But suppose the shipowner finds himself at or near the commencement of a voyage thus by genuine perils deprived of the cargo for the carriage of which he was to earn freight, and then—instead of completing the voyage empty and to no purpose—effects a new charter and fills up his ship with new cargo, what should his position be with respect to the second freight? If he is allowed to retain the whole of it, the net result of the accident—so far as the hire of his ship goes—is to let him compress what should have been two voyages into little over the time of one, and thus earn double freight for part or whole of his ship on what is practically one voyage. This seems hardly fair to the underwriter who pays a total loss on the part of the first freight destroyed: is he not entitled to have some share of the second as a "salvage" from what he has paid a loss for? It is said that this point has not been definitely settled by our courts, but that the feeling of the judges has been expressed, that in such a case the assured is bound to return to the underwriter on freight anything extra earned by the ship on the same voyage subsequent to the accident that has caused the loss.[1] Meanwhile in the American cotton-carrying trade an attempt has been made to get over the absence of legal decision by the formation of a special agreement applicable to such cases. Special agreements were made in the cases of the *Resolute*, and *Naples*, burnt at Savannah in 1887, and later in the case of the *Thalia*,. These agreements formed the basis of a form of contract now embodied in the *Cotton Conference Documents*.

(2) Next, the impossibility of taking the cargo on to destination may arise from the state of the ship. In this

[1] It must be admitted that there are often collateral losses to the shipowner which materially reduce the apparently large profit of the second freight.

case, whether the impossibility be physical or commercial, the result is the same, the shipowner is not entitled to any freight unless he delivers at destination. On the other hand, it rests entirely with him to decide whether he will forward the cargo or not. Being under no obligation to forward he will naturally adopt the solution that is most profitable to him: if he can forward at a profit he will; if not, he will not. It is therefore usually a requirement of an underwriter on the freight of a ship alleged to be irreparable at a port of refuge, that he be perfectly satisfied that the vessel is actually irreparable, and then be quite certain that every effort has been made to secure forwarding vessels at such rates as will leave to the original shipowner a profit on delivery of the cargo at destination under original charter-party or bill of lading.

Addenda.

Total Loss of Freight arising from Detention

There is another form of total loss on freight that deserves special attention in consequence of an important decision and of a clause which has been inserted in almost every freight policy since the date of the decision: constructive total loss of freight arising from delay in consequence of sea perils destroying, in a commercial sense, the venture entered into by the shipowner and the charterer.

The ship *Spirit of the Dawn* got ashore in Carnarvon Bay on 4th January 1872 on her voyage from Liverpool to Newport, where she was intended to load a cargo of rails for San Francisco. Such a time was consumed in efforts to get her off the rocks (which in the end succeeded) and in repairs, that the charterers threw up the charter and engaged another vessel to take the cargo of rails which were wanted at San Francisco for the construction of a railway. A claim was made for total loss of freight, and in the case *Jackson* v. *Union Marine*, 1873,[1] the jury found that the delay was such as to put an end commercially to the intended venture. In consequence it

[1] L.R. 8 C.P. 572; 10 C.P 125.

was decided that as the venture had been made of no effect by perils insured against, there was a constructive total loss of freight, and the sum insured on this interest was due to be paid by the underwriter.

In the charter of the *Spirit of the Dawn* there was no cancelling date, so that the charterer had not by the contract of affreightment the option of accepting or declining at his pleasure the services of the ship had she arrived at Newport after that date. But it seems unlikely that a loss of freight resulting from the exercise of a charterer's option to cancel would be sufficient to substantiate a claim for loss under a marine policy in the common form, unless perhaps the delay which gave the opportunity of cancelling to the charterer was the direct consequence of perils of the sea, or other perils insured against.

One result of the decision in *Jackson* v. *Union Marine* was the framing and general adoption of a clause to the following effect:

> Warranted free from all claim for loss of freight consequent on detention whether arising from perils of the seas or otherwise,

which is in modern practice inserted in all policies on freight. It puts an end to all question of liability of freight underwriters for loss arising from lapse of time whether the charter under which the freight is due be provided with a cancelling date or not.[1]

Total Loss of other Interests

The secondary interests, such as profit, increased value of goods, etc., commissions and brokerages of all kinds, follow in their fate the ship, cargo, and freight which have already been discussed, so that it is unnecessary to discuss separately total loss of these derivative interests.

Summary of Documents.—The documents required to establish a claim for total loss are:

(1) Protest of master.

(2) Set of bills of lading (endorsed if necessary, so as to be available to the underwriter).

[1] This principle holds also in the case of a time policy on freight. *Bensaude* v. *Thames and Mersey M. I. Co.*, House of Lords, 1897; 13 Times L.R. 501.

(3) Policy or certificate of insurance (endorsed if necessary).

(4) In United States of America. Statement of loss in detail.

In the United States of America certified copies of Nos. (1), (2), and (3) are taken; but as none of these copy-documents can transfer possession to the underwriter there is necessary for that purpose another document, viz.—

(5) Bill of sale and abandonment with subrogation to underwriter; that is, an assignment of all interest to the underwriter.

In the absence of the *full* set of bills of lading a similar document should be taken in England, especially in all cases in which salvage operations are likely to be undertaken. Such a document handed to a salvage association or a manager of salvage (whether acting for shipowner or for underwriter) settles the ownership of salved goods, and ensures that any claim for salvage expenses will be sent direct to the underwriter. This is from the assured's point of view desirable, and it greatly simplifies the management of salvage cases.

As a claim for total loss cannot extend beyond the full amount insured in the policy, it follows that the documents required to substantiate such a claim must be supplied to the underwriter free of charge.

Subrogation.—In connection with abandonment and total loss it is convenient to consider subrogation.

When a person insured suffers a total loss and is indemnified for it by his underwriter, there is in virtue of this very payment and acceptance of indemnity a transfer from the assured to the underwriter of all interest in the article insured, the underwriter acquiring all the rights of ownership at least up to the value which he has paid. If the assured absolutely abandons to the underwriter, then the latter's rights of property and recovery are not limited to the amount he has paid. In the case of *North of England Iron Steamship Insurance Association* v. *Armstrong*, 1870,[1] there is a striking instance of this. A steamer valued in her policies at £6000 was run down by another steamer. The

[1] L.R. 5 Q.B. 244.

latter was held to blame and had to pay up to the limit of her statutory liability (at £8 per ton) £5684 or thereabouts. So far, it seems only right that the underwriter should receive this amount in full. But it appeared that in the statement made by the owner of the sunken steamer and accepted by the court, the actual value of that steamer was stated at £9000. The assured claimed the portion of £5684 attaching to the difference between £9000, the actual value, and £6000 the insured value, namely, one-third or £1895. But it was held that he had no right to any share of the amount recovered, and as far as can be seen the decision would have been the same had the full £9000 been recovered. Lord Cockburn in the course of his judgment said: "Just as the underwriter would be entitled to the ship if it could have been got bodily back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision."

If this is carried a step further, it will be found in the case of loss of a vessel by collision with another vessel of the same owner, that although the owner has to pay for the cargo lost in the vessel not in fault, the underwriters on the hull of that vessel have no claim for their loss against him or his underwriters of the other vessel. The principle of this distinction is that in each vessel the underwriters are simply the bearers of a part of the shipowner's responsibilities. When a loss to either vessel occurs by the fault of the other, the underwriters on the injured ship have no rights of action beyond those enjoyed by the owner, which are in payment of the loss or damage subrogated to them; their rights of action are only his rights of action passed on to them. But as a man cannot have a claim against himself or raise an action against himself, his underwriters, although interested in entirely different and independent parts of his property, have no claim or right of action against one another (*Simpson* v. *Thompson*, House of Lords, 1877, reversing decision of First Division, Court of Session).[1]

[1] 3 App. Cas. 279. But to provide for cases of damage done in collision of ships of one owner special agreements are made in the shape of "same ownership" or "sister ship" clauses; *vide* p. 253.

"In *King* v. *Victoria Ins. Co.* (Privy Council, March 1896: 12 Times L. R. 285) it was held that where underwriters *bona fide* paid a loss for which they were not legally liable, they were subrogated to the rights of the assured." Lord Hobhouse said that such "a payment . . . was a claim made under the policy and entitled the insurers to the remedies available to the insured."

Course of Settlement of Constructive Total Loss.—At whatever point in a voyage, short of destination, the existence of a constructive total loss is proved, as soon as the loss is paid, the whole property passes over to the underwriter. The result of this is, that when a ship is sold at an intermediate port because it cannot be repaired or proceed on the voyage without repairs, and when goods are sold because they cannot be forwarded, they are sold on the underwriter's account, and the net proceeds are accounted for to him. The ordinary course of business, however, does not follow the matter thus particularly. The person who takes charge of the venture at the intermediate port, probably the captain of the ship or his agent, sends the proceeds to the shipowner, who passes over to the shippers the proceeds of their respective parcels of goods. Then the various underwriters have claims made on them for the difference between the insured value of the ship and its net proceeds, and of the goods and their net proceeds. Thus practically the claim takes the form of a total loss less proceeds. As proceeds are in such a case technically termed salvage, this form of settlement is known in the language of insurance by the name "salvage loss."

It is important to bear in mind the reason for the system followed in this payment. It is not that the goods are damaged, or that they are at an intermediate port in a damaged state; but that at a point which is not the destination of the venture the goods are sold because they cannot (physically or commercially) be carried on to destination, and being consequently a constructive total loss are surrendered to the underwriter (or sold on his account) in return for his payment of the insured value.

CHAPTER XI

THE MEMORANDUM—F.P.A. CLAUSE

THE form of policy discussed above leaves, as has already been pointed out, some uncertainty about the extent of underwriters' responsibility for total losses. The same indefiniteness prevails in the case of losses other than total. The underwriter merely undertakes "the true performance" of the contract in which he is described as being content to bear and as actually taking on himself liability for all "hurt, detriment, or damage" inflicted on the property insured by certain named perils or others *ejusdem generis*. The policy contains no words restricting the underwriter's liability to cases of total loss only: there appears, therefore, to be no doubt that unless excluded by commercial custom or by special agreement, loss of a portion of the property insured, or damage to the whole or any part of the property insured, proximately caused by perils insured against, forms a liability of the underwriter.

The correctness of this view appears established from the fact that the earliest addition to the form of policy discussed above was a paragraph in which special exceptions are made from the liabilities of underwriters. The form in which this was and still is effected is peculiar and will require examination; the effect is to free underwriters from all claims for damage or partial loss unless they reach a specified percentage. This addition to the policy is known as *the Memorandum:* it was first inserted in Lloyd's policies in May 1749, in the following form:—

N.B.—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under £5 per cent, and all other goods, also the ship and freight are warranted free from average under £3 per cent, unless general, or the ship be stranded.

The memorandum remains in Lloyd's policy unaltered except by the addition of a few words, which extend the underwriter's liability in case the ship has been sunk or burnt, or the damage has been caused by collision.

Stevens in his essay on Average (1st edition 1813, 5th edition 1835) says that "the intention of the memorandum appears to have been to prevent persons from being insured on certain articles particularly liable to waste, decay, leakage, or damage on a sea voyage, or which were of great value and small bulk, under the general expression of *goods*, whereby the insurer would run a greater risk than he had calculated on." Stevens proceeds to explain that the reason why articles subject to leakage or breakage are not enumerated in the memorandum is that, *according to the custom of Lloyd's*, such articles are free from average unless it can be shown that the ship struck the ground with such force as to make it probable that she had thereby deranged her stowage. He adds that the warranty respecting certain articles being made free of average under a certain percentage is of a later date than the general clause of "free of all average." From this it appears that before the adoption of the memorandum as a permanent addition to every policy the component parts of it must have been used separately as required by underwriters.

Benecke (*Principles of Indemnity*, chap. x.) traces the memorandum to the attempts of underwriters to counterbalance the effect which the natural quality of certain articles must necessarily produce upon the risk of the underwriters, and to put goods of every description upon an equal footing. In different countries different methods have been tried for the attainment of the same end; in Holland an attempt to adjust the premium and introduce

special stipulations for different articles had to be abandoned (Marshall, p. 215).

The paucity of the articles enumerated is striking: it would be inexplicable were it not that the application of the memorandum was only the first step towards the framing of special terms for the insurance of different classes of goods, which in the end have superseded the memorandum. As to what was understood to be included under the names of the articles, we learn from Park [1] and Marshall [2] that under "corn" are included malt (*Moody* v. *Surridge*, 1794), pease (*Mason* v. *Skurray*, 1780), but not rice (*Scott* v. *Bourdillon*, 1806), that "salt" does not include saltpetre (*Journu* v. *Bourdieu*, 1787). In fact the words are used in their ordinary trade sense, according to which it is quite reasonable that jute should not be included under "hemp" or "flax," and that in the United States furs have been held not to be included under "hides" or "skins" (Phillips, § 1764, quoting *Astor* v. *Union Insurance Company*, 7 Cow. N.Y. 202).

The wording of the memorandum leaves much to be desired: it has been the subject of litigation from 1754 to 1893. There have been disputes about (1) the meaning of the phrase "warranted free from average," (2) the effect of the words "unless general," and (3) the interpretation of the words "or the ship be stranded."

(1) *Warranted free from Average.*—The difficulty here is due to the uncertainty which prevails regarding the meaning of "average." It will be more convenient to discuss this word later, meanwhile it is enough to say that it here means "loss less than total and resulting from sea damage." The effect of these words taken in connection with the percentages stipulated in the remainder of the clause is, as regards the group of articles first named, "to free the policy for any extent of deterioration by sea damage however great which does not amount to a total loss" (Arnould, p. 875); as regards the second and third groups, to give the same freedom for any extent of deteriora-

[1] Marine Insurance, p. 179. [2] Insurance, pp. 216, 218.

tion by sea damage however great not amounting to 5 per cent and 3 per cent respectively.

(2) *Unless general.*—It was held by Lord Mansfield (*Wilson* v. *Smith*, 1764),[1] that the word *unless* here means the same as *except*, and is not to be construed as denoting a condition; that is to say, the clause means that except general average no loss resulting from sea damage and less than total loss shall be paid, and does *not* mean that no loss resulting from sea damage and less than total loss shall be paid unless general average occur, in which case partial loss resulting from sea damage shall be paid. In *Price* v. A1 *Small Damage Association*, 1889,[2] Lord Justice Fry stated that "free of average unless general" is equivalent to "free of particular average," a term which will be the subject of examination later.

(3) *Or the ship be stranded.*—As the underwriter's exemption from claim for anything short of a total loss of certain articles, or of loss of a certain named percentage on others, is removed by the "stranding" of the ship, it becomes of great importance to know what is covered by that word. Lord Ellenborough, in *M'Dougle* v. *Royal Exchange*, 1815,[3] said that the various decisions given displayed "a curiosity not at all creditable to the law."

First, to describe what it is *not*. It is not a mere striking either of the ground or of anything firmly attached to it, such as piles, wrecks, stones, or rocks. Striking a floating wreck in mid-ocean does not constitute a strand, for it is essential that the object touched be attached to, or be in immediate contact with the bottom. Even remaining for a time in firm contact with a floating wreck does not amount to a strand. It is not a mere touching and grazing along the ground; nor does striking a reef and staggering over it constitute a strand.

In describing what *is* included under the word "stranding" or "strand" some of the text-books use a phrase which expresses in a way what is required, but still is not free from objection; they speak of a vessel not being

[1] 3 Burr. 1550. [2] L.R. 22 Q.B.D. 580.
[3] 4 Camp. 283.

stranded (within the meaning of the memorandum) unless she settles down on the obstructing object in a quiescent state. Careful examination shows that this is a very exacting definition. It is doubtful whether the vessel need either settle *down* or be absolutely *quiet*. But she must remain firm and fast in the sense of not being able to proceed on her course of navigation without perceptible loss of way for an appreciable period of time. Then, if the obstruction causing the loss of way is ground, rock, bottom of some kind, or something in immediate contact with it, like a wreck lying at the bottom of the sea, or loose rocks or stones, or something fixed in it like piles, the vessel is stranded. Provided she cannot get over the obstacle, her not settling *down* and her not being absolutely *quiescent* hardly seem sufficient to prevent her being considered "stranded."

The stoppage must be perceptible and must last for an appreciable period of time. As Lord Ellenborough put it in *Baker* v. *Towry*, 1816 :[1] "It is not merely touching the ground that constitutes stranding. If the ship touches and runs, that circumstance is not to be regarded ; but if she is forced ashore, or driven on a bank and remains for any time on the ground, this is stranding without reference to the degree of damage she may thereby sustain." In the case then before the court the vessel had been fifteen to twenty minutes on the ground. In another case Lord Ellenborough more closely defined his idea of what he meant by "remaining for any time on the ground." In *M'Dougle* v. *Royal Exchange*, 1815,[2] a vessel coming out of harbour fell over on her beam ends, and after so remaining for one minute and a half floated off and proceeded on her voyage. Lord Ellenborough decided that this was NO stranding. He said: "To use a vulgar phrase, which has been applied to this subject, if it is touch and go with the ship there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's

[1] 1 Stark 436. [2] 4 Camp. 283.

motion. If by the force of the elements she is run aground and becomes stationary, it is immaterial whether this be on piles or on rocks or on the seashore, but a mere striking will not do wheresoever that may happen." Later in the same judgment he said: "I take it that stranding in its fair legal sense implies a settling of the ship,[1] some resting or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked; from which misfortune a great deal of damage does frequently occur." The decisions, therefore, determine that to constitute a strand a stoppage of something between one and a half and fifteen minutes must occur.

Baily (Perils, p. 180) suggested that "the centre of gravity of a vessel must be supported by the ground before it can be said that she is stranded." But there does not appear to be anything in the decisions to support this view, and the latest text-book writers characterise it as "perhaps too severe" (Lowndes, Law M. I. p. 197), or as "erring on the side of undue stringency" (M'Arthur, Contract, p. 290). If the suggestion of Baily were taken literally, a vessel with stem and stern firmly fixed on two ridges of rock, but with the rest of the keel free, would not be stranded; nor would one holed by a sharp rock at any point except exactly under the centre of gravity, even though the rock held the vessel firm, like a pivot; nor one bilged by a rock to the one or the other side of the keel, even though held firm by the rock. It is enough if the vessel is firm and fast to such an extent that for an appreciable time the course of the vessel's navigation is perceptibly interrupted.

The stranding must be fortuitous, accidental—not part of the customary navigation on the voyage insured. For instance, a vessel going up the river to Cork took the ground once for eight hours, and again for ten hours, owing to the shallowness of the water; and after mooring at a quay in Cork harbour she fell when the tide ebbed and lay on her broadside for two whole tides. It appeared from the evidence in the case, that taking the ground in this

[1] It is worth noting that Lord Ellenborough does not say "a settling *down* of the ship."

manner was no more than was usual with this class of vessels in the Cork river. This was held not to be a stranding, because it happened in the ordinary course of navigation (*Hearne* v. *Edmunds*, 1819).[1] So when in a tidal harbour a vessel moored in a proper berth took the ground at ebb tide, as and where it was intended, and damaged herself on some hard substance, it was held that the vessel did not strand, but merely took the ground in the ordinary course of navigation (*Kingsford* v. *Marshall*, 1832).[2] "Otherwise," said Chief Justice Tindal in his judgment, "at every ebb of the tide there would be a stranding, and the memorandum intended for the security of underwriters against partial losses upon perishable articles would be nugatory."

But where the ground is taken intentionally, as when a vessel is beached to prevent her sinking in deep water, this is held to constitute a strand; the reason being that "the ship was laid on the strand not in the *ordinary* course of navigation, but *ex necessitate* to avoid an impending danger (Mr. Justice Bayley in *Barrow* v. *Bell*, 1825).[3] In the case of a vessel which for the safety of the whole venture entered a tidal harbour, forced by stress of weather to take any place of refuge that could be found, and there grounded, it was held by the Court of Queen's Bench that such a grounding constituted a stranding within the memorandum (*Corcoran* v. *Gurney*, 1852).[4] As Chief Justice Tindal put it in *Kingsford* v. *Marshall*,[5] "where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding."

It should be noticed that in the case of goods insured in a ship on a policy with the ordinary memorandum, and not containing the lighterage clause, the stranding of a lighter does not produce the same extension of the underwriter's liability as the stranding of the ship (*Hoffman* v. *Marshall*, 1835).[6]

[1] 1 Br. & B. 388. [2] 8 Bing. 458. [3] 4 B. & Cr. 736.
[4] 1 E. & B. 456. [5] 8 Bing. 458. [6] 2 Bing. N.C. 383.

Two recent cases are of interest as defining the application of the memorandum more closely. In the *Alsace and Lorraine* (*Blackwood, Bryson, and Company* v. *British and Foreign Marine Insurance Company*, 1893),[1] the vessel met with bad weather on her voyage from Calcutta to Demerara, had to jettison part of her cargo of rice—damaging some of the remainder in the operation—and put into Mauritius for repairs. The cargo was discharged, and part of it found to be unfit for reshipment was sold. Before the repairs on the vessel were completed she was driven on the rocks by the great cyclone of April 1892; she remained hard and fast, and was so damaged that she was hopelessly lost. The unsold portion of the cargo was forwarded to destination in the *Brazil*, which met with bad weather, in consequence of which the rice on board of her was damaged. Claim was made for the amount of this damage on the ground that "the vessel" had stranded. There was no dispute about the facts. The plaintiffs' contention was that if the vessel strands after the shipment of the goods, while the vessel is still under contract to carry the goods, and during the currency of the policy covering the goods, such stranding removes the exception from the memorandum, even though at the time of the stranding the goods were not on board. This view was not accepted by Mr. Justice Barnes, who found for the defendants with costs.

Similarly, in *Thames and Mersey Marine Insurance Company* v. *Pitts, Sons, and King*, 1893[2] (an action to recover money overpaid), a vessel loaded cargo at San Nicolas and on her way to Buenos Ayres she stranded. At Buenos Ayres she took more cargo on board, and it was claimed by the cargo-owners that the stranding was a stranding in the sense of the memorandum even as regards the goods shipped thereafter at Buenos Ayres. The judges (Justices Day and Collins) held that the stranding of the vessel did not affect any cargo except such as was on board when it occurred.

[1] 9 Times Law Rep. 484.
[2] 1 Q.B. 476.

Consequently it may be taken as settled that to constitute a stranding in the sense of the memorandum the interest insured must be in one common adventure with the ship at the time when the ship takes the ground.

Within five years after the addition of the memorandum to the policy the courts were called upon to decide whether in a case of strand the underwriter was obliged to pay his *pro rata* share for all the damage which the goods sustained during the voyage, or only for what was occasioned by the stranding. Upon a policy on corn (*Cantillon* v. *London Assurance*, 1754),[1] it was held by Sir Dudley Ryder that the stranding entitles the assured to claim the whole loss occurring on the voyage. One consequence of this decision was that the London Assurance and the Royal Exchange Assurance struck the words "or the ship be stranded" out of their policies. There was some wavering on the part of the courts in later cases, but it was finally settled by Lord Kenyon's decision in *Burnett* v. *Kensington*, 1797,[2] that "if a ship be stranded and the cargo suffer no damage whatever, and afterwards the vessel meet with bad weather and the cargo sustains an average loss, say of 90 per cent, the underwriters are answerable for the whole of that average loss."

On a somewhat similar principle it has been decided that to constitute a percentage claim on goods named in the second and third classes in the memorandum, it is not necessary that the damage making up the full percentage must all happen on one occasion or from one kind of casualty. It is enough if it occurs in the course of the voyage insured, and results from perils insured against. But the stipulated percentage must consist entirely of actual damage sustained by the goods insured; it cannot be composed partly of such damage and partly of such other items as general average, or of particular charges, or of expenses incurred in proving the claim (cf. *Kidston* v. *Empire Marine*, 1866).[3]

It was mentioned above (p. 172) that words have been added to the memorandum extending the liability of the

[1] Cited 3 Burr. 1553. [2] 7 T.R. 210.
[3] L.R. 1 C.P. 535; 2 C.P. 357.

underwriter. In the case of the *Glenlivet* (Admiralty, March 1893),[1] Mr. Justice Barnes stated that for about the last thirty years the words "sunk or burnt" have generally been added to the memorandum.

As stranding designates accidental resting of the ship's side or bottom on the ground in such a way as to make her innavigable and to damage her, so sinking must mean such accidental deepening of the ship's draft as will permit water to pour into her by the hatches, or other proper openings in her, and bring her down beneath water level. The only English case on sinking is *Bryant and May* v. *London Assurance*, 1886 (in Queen's Bench before Mr. Justice Grove and a special jury),[2] in the matter of a cargo of match splints per *B. C. Boyesen* from Quebec to London. On the vessel's arrival at Gravesend the water was over the deck as far aft as the mainmast, abaft the mainmast it was dry; the captain's cabin and hurricane deck were dry. The cargo was very much wetted, but part of it was delivered dry. The plaintiffs contended that this constituted a sinking within the meaning of the memorandum, saying that the vessel had sunk as far as a vessel with a timber cargo could sink. But both of their witnesses admitted that had the cargo become more saturated with water the ship would have sunk further. The case was decided in favour of the defendants. But if a sinking were to be of such a character that, to use the words of Lord Ellenborough in *M'Dougle* v. *Royal Exchange*, 1815,[3] "the ship may *pro tempore* be considered as wrecked," such a disaster would certainly remove the exception laid down in the memorandum.

In the case of burning another difficulty arises. If the property insured is a cargo of flour, and if this interest takes fire and is burnt without the ship being damaged by the fire, the exception has not been taken out of the memorandum, and the underwriter remains free of claim for partial loss or damage of the flour. It is the *ship* that

[1] 9 Times Law Rep. 360; decisions affirmed by Court of Appeal, 10 Times Law Rep. 97, but Mr. Justice Barnes's reasons disapproved.
[2] 2 Times Law Rep. 591. [3] 4 Camp. 283.

must be burnt, say a beam scorched, a floor charred, a ceiling burnt. Consequently the destruction of a cabin by fire removes the exception, while a fire in the cargo itself does not. Such was the view acted upon almost universally until quite lately. But a recent decision of Mr. Justice Barnes (the *Glenlivet*, 1893)[1] has raised a new point. Fire occurred thrice, once on each of three separate and distinct voyages, in the *Glenlivet's* coal bunkers but did not pass beyond them. As it was decided by Lord Ellenborough that a mere touching of the ground was not sufficient to make a strand, so it is now decided in the *Glenlivet* case that a mere burning is not sufficient to take the exception out of the memorandum ; it must be such a burning as to constitute a substantial burning of the ship as a whole. The judgment in the *Glenlivet* has excited considerable attention, as it takes away on principle what was long granted without question. But indeed it is not easy to see why a fire in a ship's bunkers or cabin should be enough to establish a claim for damage to cargo arising from some other peril barred by the memorandum, when a touch-and-go graze on a rock, even if actually causing damage, is not enough. Since the issue of the decision some slips have had the words "on fire" added to "burnt," confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision.[2]

In consequence of the great increase in the number of

[1] 9 Times L.R. 360 ; 10 Times L.R. 97.

[2] But will not exactly the same principle that was applied in the interpretation of "burnt" be applied to that of "on fire"? For it is not a question of the extent of the effect of ignition ; if ignition results in the total loss of the property insured, then the loss is claimable as a total loss and not under the memorandum or any other clause referring to partial loss ; if it does not result in a total loss, then, as far as the memorandum is concerned, is it not all the same whether you say "burnt" or "on fire" so long as the principle of "substantial burning of the ship as a whole" is applicable? This is the principle stated by Lord Justice Lindley in the *Glenlivet* decision, Court of Appeal, 1894, 1 Q.B.D. 48 : "I take it the context shows what is meant is that the ship as a whole must be stranded, sunk, or burnt ; and I cannot accept the suggestion of the plaintiff's counsel that any fire on board a ship doing little structural damage to the ship itself is a burning in ordinary language. . . . Of course in one sense it is burnt ; anything that burns any part of a ship is a burning of the ship, but I cannot think that that is the meaning of it here."

collisions occurring at sea since the introduction of navigation by steam, it has lately become customary to add to the memorandum in policies the words, "or the damage be caused by collision," occasionally supplemented by the words, "with another ship or vessel."[1] There are various forms of the addition, but the one just given is the most equitable between assured and underwriter, and the least likely to lead to results disappointing to either party. The form "or in collision" is open to the objection that the mere fact of the carrying vessel being in collision would remove the exception from the memorandum, and that the policy would then be liable for the payment of damage arising from some other peril barred by the memorandum.

The form "or the damage be caused by collision" suggests the true middle course open to assured and underwriters in the matter of stranding and burning. As matters are at present, the assured feels the hardship of not being able to recover the amount of damage done by fire to and in his cargo unless the fabric of the ship has been burnt; the underwriter feels the hardship of being legally obliged to pay for sea damage to cargo which has not resulted from any serious peril, but is claimed on the ground of a merely technical strand. Why not solve both difficulties by making the memorandum read, "unless caused by stranding, sinking, burning, or collision with another ship or vessel, wreck or ice"?

The preceding remarks bear more particularly on the relation of the memorandum to goods, the bearings of the memorandum on ship and freight will be examined later.

It is of interest to note that the American form of policy follows the English in adopting the plan of making a memorandum deal with the particular average liabilities of the underwriter on some interests. The text of the policy provides that "no partial loss or particular average shall in

[1] Lord Coleridge in *Richardson* v. *Burrows*, 1880, gave it as his opinion that in the memorandum collision means "collision with another ship" (Lowndes, Law M. I. p. 199). Compare Mr. Justice Barnes in the *Munroe* (Prob. Div. 1893, p. 248), Mr. Justice Mathew in *Kirkmichael* and *Osseo* (*Union M. I. Co.* v. *Borwick*, Q.B., 20th June 1895), 11 Times L.R. 465, and Mr. Justice Bigham in *Chandler* v. *Blogg* (24th Nov. 1897, 14 Times L.R. 66).

Addenda.

any case be paid unless amounting to 5 per cent." Then follows the memorandum :—

Memorandum.—It is also agreed that bar, bundle, rod, hoop, and sheet-iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags and bagging ; pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general ; hemp, tobacco stems, matting, and cassia, except in boxes, free from average under 20 per cent, unless general ; and sugar, flax, flax seed, and bread are warranted by the assured free from average under 7 per cent, unless general ; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under 10 per cent, unless general.

WARRANTED by the insured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. Not liable for leakage of molasses or other liquids unless occasioned by stranding or collision with another vessel.

This is very stringent, far more closely binding than anything ever introduced into the English policy for general use ; and the occurrence of even an important casualty to the vessel carrying the goods does not subject the underwriter to any liability unless the damage amounts to the stipulated percentage, or unless, in the case of leakage, it is actually occasioned by stranding or collision. The absolute exclusion of such damage as gave rise to the case *Montoya* v. *London Assurance*, 1851[1] (see p. 97) is stated in extremely strong language ; mere contact with sea water is not enough to constitute a claim, the contact must have been occasioned by sea perils.

THE FREE OF PARTICULAR AVERAGE CLAUSE

After 1749 the course of insurance business showed that the memorandum afforded only a moderate protection to underwriters on goods. As was remarked above (p. 173) the paucity of the articles named is striking. The meagre-

[1] 6 Exch. 451.

ness of the memorandum was soon rectified by the construction and employment of a clause known as the "Free of Particular Average" clause, the F.P.A. clause. It was found that it suited both merchants and underwriters that some of the articles named in the second group of the memorandum should be insured on the stricter and cheaper terms of the first group, namely, free from average, unless general, or the ship be stranded; and the same held true of many articles not specified in either the first or the second group, but included under the words "all other goods," which in the memorandum are warranted free from average under 3 per cent, unless general, or the ship be stranded. It thus becomes customary to regard most insurances on goods as being done either on the terms of the first group in the memorandum, or on special "average" terms, to the consideration of which we will turn later.

The memorandum being employed in permanent addition to the policy, it became necessary to indicate by special clause on the policy any departure from memorandum terms in the insurance of goods or other property. The adoption of the terms of the first group of memorandum articles became so common that the clause became known as *the* free of particular average (F.P.A.) clause absolutely. The first form of the clause was exactly as at the beginning of the memorandum:—

Warranted free from average, unless general, or the ship be stranded.

This clause written on or attached to a policy for sugar, flax, or hides, or any of the second group of memorandum articles, overrides the words providing for the payment of average if exceeding 5 per cent; for manufactured goods it overrides the words providing for payment of average if exceeding 3 per cent.

As in the memorandum, so in the F.P.A. clause, it was found necessary to permit the occurrence of other casualties besides stranding to annul the exception; the clause consequently took the form:—

Warranted free from average, unless general, or the ship be stranded, sunk, or burnt.

Or, substituting for the words "average, unless general," the equivalent given by Mr. Justice Fry (p. 174), "particular average," the following form :—

Warranted free from particular average unless the ship be stranded, sunk, or burnt.

Then it became necessary to include stranding, sinking, and burning of craft, and the clause became—

Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance.

The peril of collision becoming more and more important, it became usual to add after "burnt" some words by which the underwriter assumed liability for the proximate effects of the peril. The objections to the apparently simplest form of expressing this, namely, "or in collision," have already been pointed out (p. 182); they led to the addition of such phrases as—

The collision to be of such a nature as may reasonably be supposed to have caused or led to the damage. Or,

The collision to be of such a nature as may reasonably be considered to have occasioned damage to cargo. Or,

The collision to be of such a nature as to have been the proximate cause of damage to the interest.[1] Or,

The collision to be of such a nature as may be reasonably supposed to have caused or led to the damage.[2]

Much the best way is to avoid entirely the use of the words "or in collision," and instead to use the form—

Or the damage be caused by collision with another ship or vessel.

[1] Seemingly an inadequate form and dangerous for the assured. Would it cover anything except the damage done by the structure of the ships colliding with one another? would it properly cover damage done by water coming in through a hole or leak resulting from collision? (cf. Lord Justice Lindley in *Reischer* v. *Borwick*, July 1894). See pp. 139, 142.

[2] Seemingly dangerous for underwriters; might not secondary or consequential damage be claimed under the words "led to the damage." Perhaps the insertion of the word "immediately" before "led" would suffice to make the clause safe.

Even this expression was not found to be enough. There are certain expenses connected with a vessel's putting into a port of refuge in distress, such as warehousing, reshipping, and forwarding charges. These when incurred by the shipowner have always been charged by him against the cargo, and are admitted by law in certain cases as properly chargeable. Underwriters agreed to assume responsibility for their proper proportion of such charges, and this arrangement was embodied in what was known as the "forwarding clause":—

To pay warehousing, forwarding, and other special charges if incurred.

But *special charges if incurred* might be much too comprehensive a phrase; an attempt might be made to include under it such charges as distance freight payable to a foreign ship condemned at an intermediate port, and other expenses such as would not be recovered under an ordinary English "clean" policy (*i.e.* policy consisting simply of the common text and the memorandum). To prevent any such incidence on underwriters of amounts not already at their charge, the words "if incurred" were omitted, and the clause was completed with the phrase "for which underwriters would otherwise be liable," where "otherwise" means "by some provision of the policy different from the clause now under discussion." The forwarding clause thus stood:

To pay any special charges for warehouse rent, reshipping, or forwarding, for which underwriters would otherwise be liable.

To these provisions was added one dealing with loss in transhipment,—in itself quite a reasonable thing to be covered by underwriters on goods. But here again there has been considerable difficulty in the wording. The first form was got by adding to the words covering collision damage words like the following:—

As well as partial loss arising from transhipment.

The objection to this form is that partial loss includes deterioration as well as total loss of a part of an interest insured. The perception of this and of the fact that with

such a form of words underwriters might have to pay for damage suffered in transhipment of a class of goods from which under the F.P.A. clause they would be exempt in any other part of the venture, led to the disuse of the form given and to the substitution of the following :—

To pay the insured value of any package or packages which may be totally lost in transhipment.

As a *quid pro quo* for this extension of liability, the assured, by special agreement with the underwriter, accedes to the following restriction of the underwriter's liability :—

Grounding in the Suez Canal is not to be deemed a stranding, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.

Such were the stages in the history of the F.P.A. clause as it is now known. At a general meeting of the underwriting community of the United Kingdom, assembled at Lloyd's on the 17th July 1883, a form of clause was adopted which has become the customary English form, and is, in absence of any special agreement between assured and underwriter, *the* F.P.A. clause ; it reads—

Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.[1] Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.

[1] *Transhipment* means generally the act of transferring goods from a vessel in which they have been carried to another vessel for the completion of their voyage. If taken strictly, its application in this clause is confined to the mere act of lifting from the earlier vessel to the later vessel employed in the carriage of the goods, or if a lighter or other craft is employed to carry the goods between the vessels—from the earlier vessel to the lighter and from the lighter to the later vessel. It is reasonably extended to the conveyance between the two vessels, but does it include any stay on quay in case the first vessel discharges direct on to quay and the second loads direct from quay? So long as the stay on quay is merely incidental to the removal from one vessel to another, the inclusion of the risk for a moderate time is not unreasonable, but the moment that stay becomes delay or storage the case becomes doubtful.

CHAPTER XII

PARTICULAR AVERAGE

BEFORE proceeding to the consideration of particular average and the method in which underwriters' liability for it is determined, it may be remarked that the percentages named in the memorandum have not continued to be applied in their original sense (see p. 195). Stevens (Average, p. 227, note) says : "I have been informed by a gentleman of great experience, who was one of the subscribers to old Lloyd's in Lombard Street,[1] that the intention of the memorandum when first inserted was that the £5 per cent or £3 per cent (according to the thing insured) on the amount of the interest should in all cases be deducted from the average, the underwriter paying the balance, and that this was then the practice."

Leaving aside for the moment the discussion of the word "average" and phrase "particular average" we may examine the definitions of the text-books.

Arnould (p. 970) says : "Particular average is loss arising from damage accidentally and proximately caused by the perils insured against, [or from extraordinary expenditures necessarily incurred for the benefit of] some particular interest, as the ship alone or the cargo alone."

Owing to the decision in *Kidston* v. *Empire Marine*, 1867,[2] the words in brackets must be deleted and the word "to" substituted.

[1] Martin (*History of Lloyd's*, p. 120) says that Old Lloyd's ceased to exist soon after October 1770.

[2] L.R. 1 C.P. 535 ; 2 C.P. 357. See below, pp. 221, 223.

Phillips (§ 1422) says: "A particular average is a loss borne wholly by the party upon whose property it takes place, and is so called in distinction from a general average for which divers parties contribute."

These definitions appear rather to describe a loss borne by a shipowner or merchant than the indemnity which he recovers from his underwriter, subject to the terms of the contract between them, so that perhaps the following modification of Arnould's definition may make the matter clearer:—

"Particular average is the liability attaching to a marine insurance policy in respect of damage or partial loss accidentally and immediately caused by some of the perils insured against, to some particular interest (as the ship alone or the cargo alone) which has arrived at the destination of the venture."

In the discussion of the method of settling a constructive total loss and a salvage loss, it was pointed out that the reason of the transfer of property in such a case to the underwriter was neither that the goods were damaged, nor that they were at an intermediate port in a damaged state, but that they could not (physically or commercially) be carried on to destination, and being consequently a constructive total loss, are surrendered to the underwriter in return for the payment of the insured value.

The method of claiming indemnity for damage to interest arriving at destination *in specie* and otherwise than as a total loss, must be based on some principle that does not place the property with the underwriter. A policy of marine insurance is not a document guaranteeing the safe and sound arrival of a venture at destination. It is a contract of indemnity against the results of certain named perils, the indemnity varying as the amount of the loss varies. As the idea of quantity is thus an essential factor in indemnity, one naturally expects the quantities involved in any particular case of indemnity to be those stated in the contract taken in conjunction with those necessary to express the loss for which indemnity is wanted. Therefore it is natural to expect that to determine the indemnity due to the assured

in a contract of marine insurance, one should find it necessary to introduce and combine in some way these four factors : the sound value with the damaged value (to determine the merchant's loss), the valuation in the policy with the proportion of it insured by each separate underwriter or insurance company (to determine the insurer's liability).

Damage falling on property carried by sea may show itself in three ways, by

(*a*) Diminution of quantity,
(*b*) Deterioration in quality,
(*c*) Diminution and deterioration.

In goods arrived at destination all three kinds of damage are technically described as particular average or partial loss. But in the common language of business it is usual to employ the name *particular average* to designate (*b*) and (*c*), and to indicate by the phrase *total loss of part* the mere diminution of quantity (*a*).

In claims for indemnity against partial loss, regard must be paid to many of the points that came up in the consideration of total loss. For instance, the damage must not have arisen from the negligence or misconduct of the assured or his agents, nor from the essential character or natural quality or inherent vice (*vice propre*) of the object insured, nor—and this comes out more clearly in the case of partial loss than of total—from the ordinary wear and tear inseparable from the carrying on and completion of the voyage.

Average "as Customary."— After these points have been satisfactorily disposed of, there is another matter to consider : the intention of assured and underwriter regarding partial loss when they entered into the contract of which the policy is the expression. But the proneness of the English trader to cling to precedent, and to prefer adhesion to what has been customary—even though he himself does not know the details of the custom — rather than run the risk of launching out into the unknown in the shape of a special agreement, often comes into play in this connection, and it is very usual to find in policies the clause "average payable as customary."

Free of All Average (F.A.A.) Policies.— It might have been thought that the insurance of goods "free of all average" could not have given room for any difficulty. But in 1857, Mr. Justice Williams gave two decisions which show how difficult it sometimes is to determine liability. In *Duff* v. *Mackenzie*, 1857,[1] a captain insured his effects for £100, and it was arranged and agreed that the insurance was to be free of all average, *i.e.* the underwriter was to pay no claim for deterioration or partial loss. The assured did not furnish for statement in the policy any specification of the various property he had with him, nor did he give the value of the separate items or classes of goods covered by him. But having lost some of his effects he made a claim, and it was held that when two or more different and distinct kinds of goods are insured on one policy, the loss of the whole of any one kind entitles the assured to claim the insured value of the same. In a later case, *Wilkinson* v. *Hyde*, 1857,[2] with respect to a policy on emigrants' effects, the same judge expressed the principle on which he decided both that case and *Duff* v. *Mackenzie* as follows: "As soon as it is ascertained that the goods are of different species, it is as if the different species were enumerated." The effect of these decisions is to make what is practically a partial loss recoverable on a policy free of all average, in all cases where several classes of goods are insured under some general term like "goods" or "merchandise" or "effects," although technically the losses must be claimed as total losses of distinct classes of property.[3]

Franchise.—In the examination of the memorandum it was pointed out that the different percentages therein enumerated were based on considerations of the greater or less liability of the goods to damage. The same considerations have led to the different average terms on which different goods are insured. Some articles seem always to show a certain proportion, more or less, of diminution and

[1] 3 C.B. N.S. 16. [2] 3 C.B. N.S. 30.

[3] The cases are dealt with here because of their *practical* effect: in a strictly systematic work they should be reviewed under "total loss."

deterioration at the end of a voyage. To exclude this apparently inevitable loss, and to prevent the occurrence of vexatious petty claims, it has been arranged that all claims falling short of a certain amount or percentage should not attach to the policy covering the goods. This amount or percentage is termed the *franchise*.

Series.—As ships increased in size, and as some particular commodities began to be carried either in full cargoes or in parcels of considerable value, it was found that although the percentage was small, the amount in cash required to amount to this percentage was considerable. This being found to leave upon the assured a share of the risk greater than seemed to be reasonable, the plan was adopted of breaking up the cargo or parcel into smaller subdivisions, and of stipulating that, if in any one of these the requisite percentage of damage was attained, the underwriter should pay his proper proportion of it. Each of these subdivisions is technically termed a *series*. Taking the instance of sugar from Java to Europe, the average terms are that the underwriter pays average if amounting to a franchise of 5 per cent on any series of twenty baskets running landing numbers. By "running landing numbers" is meant that the baskets are to be taken in sets of twenty as they come out of the hold and are landed on the quay. Similarly, in cotton the average terms are warranted free of particular average under 3 per cent on each ten bales running landing numbers. The more delicate the goods the higher the franchise is likely to be; *e.g.* ginger, gambier, dye-stuffs, like myrabolams, have a franchise of 5 per cent; and tobacco is frequently insured on such average terms that the underwriter pays only the amount of average exceeding 5 per cent.

As to series, it may almost be taken as a rule that the more valuable the goods the smaller the series, the idea evidently being that a series should not in value exceed a certain fairly moderate sum (about £100). Thus when underwriters insure cigars against average the series generally consists of one case; cotton, ten bales running landing numbers; silk, each package; indigo, each package; tea, ten chests,

twenty half-chests, or forty boxes running landing numbers; sugar, twenty baskets (Java), ten hogsheads, twenty barrels, ten cases, or fifty bags.

There is a very full collection of customary average clauses in Lowndes's Law of M. I. pp. 241-244. In that list the series is given fully, but not always the franchise. It is interesting to note the difference of average terms on the same article shipped from different ports, and on the outward and inward shipments, as well as on the raw article and manufactured goods. For example, on coffee from Java to Europe the terms are 3 per cent on twenty-five bags; from Brazil to United States 5 per cent on two hundred and fifty bags; on sugar shipped outwards from England the series is five casks or twenty bags; inwards ten hogsheads, twenty barrels, ten cases, fifty bags, or twenty baskets.

Average "on the whole."—When provision is made for settling average on series less than the whole quantity insured on the policy, it may happen that the damage is in several series so slight that the franchise is not attained, while in others it is so severe that if it is taken together with what has been rejected as not attaining the franchise, then the franchise necessary to constitute a claim has been reached on the whole parcel or shipment. Take for instance one hundred chests of tea, *i.e.* ten series of ten chests each, franchise 3 per cent. If one series is damaged to the extent of 10 per cent of its value, one 7 per cent, one 15 per cent, one $2\frac{1}{2}$ per cent, and three 2 per cent each, the remaining three series being perfectly sound, the franchise of 3 per cent is evidently attained in only three of the series. But if the percentages of damage are calculated out and added, it will be found that they amount to 4.05 per cent on the whole one hundred chests. It is thus evident that cases can arise in which the strict application of the series would deprive the assured of some of the indemnity he would have received had his insurance been on the same terms of franchise, but without any mention of series. But as the series has been introduced into the contract with the intention of extending the indemnity

granted to the assured, the clause providing for it is not permitted to work to his detriment (see *sup.* Principles of Interpretation, p. 136; cf. *Hagedorn* v. *Whitmore*, 1816).[1] In many average clauses this is definitely expressed by the addition of the words "or on the whole."

Formation of Series.—In series which consist of more than one package, case, or bale, it was originally stipulated that the series should be made up of a certain number of packages taken as they were landed on the quay. This stipulation has been pared down to the minimum of importance. The damaged packages are either not landed in the order in which they would have come out of the ship if sound, or if so landed they are entered in the landing books all together at the end of the cargo. The result is, as a rule, almost all the seriously damaged packages in a cargo of produce are found entered in the last few pages of the landing books. This procedure practically secures to the assured the recovery of all damage of any moment; but it is not what was contemplated when the wording was devised. Lowndes (Law M. I. p. 200) speaks of this as a practice prevailing in some ports; unfortunately it has become so usual that exceptions only rarely present themselves.

Tail Series.—When on the formation of the cargo into series it is found that some packages remain over, these, however few in number they be, are taken to constitute what is called a tail series, and average is payable by the underwriter on them if it reaches the stipulated proportion of *their* insured value (as distinguished from the insured value of a *full* series). For instance, in shipment of fifty-three bales of cotton, in whatever way the bales are grouped, there must always be five series of ten bales and three bales over. The three odd bales form a tail series, and if damage is found in them exceeding 3 per cent on the value of the three bales, it is recoverable from the underwriter.

Franchise how Applied.—It was observed (p. 188) that

[1] 1 Stark 157.

the underwriters in "Old" Lloyd's understood that the percentages named in the memorandum were always to be deducted from any claim for average made in terms of the memorandum. In all probability the same held true of the franchises mentioned in average policies. But nowadays in England when the franchise is once reached, the whole amount of average *including the franchise* is paid by the underwriter, unless the contrary is expressed. For instance, if the franchise on any class of goods is 5 per cent, and a shipment of these goods is damaged to the extent of 7 per cent, then it is not 2 per cent (the difference between the damage and the franchise) that is paid, but the full 7 per cent. If it is intended by the underwriter that he shall be liable only for the excess of any definite percentage, that ought to be clearly expressed in the policy. In French policies this difference is expressed with the most scrupulous exactness; "claim for material particular average to be paid in full if the franchise is reached" (*remboursement intégral, franchise une fois atteinte*), as distinguished from "franchise always deducted" (*franchise toujours déduite*). The distinction can be perfectly well expressed in English: "to pay particular average if amounting to . . . per cent or over" as distinguished from "to pay the excess of . . . per cent particular average."

Adjustment of Particular Average.—Suppose that a parcel of goods or produce insured against particular average has arrived damaged by sea water, and that particulars have been obtained of the amount of damage and the series over which it is spread. Suppose it to be a case of such serious damage that the franchise is indubitably attained, how is the amount due by the underwriter to be determined? As was said above (p. 190), in a claim made under a contract of indemnity one naturally expects to find the quantities involved to be the value of the goods when sound, their value in their damaged condition (the difference being the merchant's loss), their valuation in the policy, and the share of that valuation insured by each separate underwriter or insurance company.

The first great English case on this subject is *Lewis* v.

Rucker, 1761.[1] It was on a policy covering sugars, valued at £30 per hogshead, from the West Indies to Hamburg. When the sound value at destination was compared with the damaged value it was found that the merchant's loss by sea perils amounted to about 17 per cent. Lord Mansfield and his associates on the bench decided that the underwriters must pay 17 per cent of the amount at which the sugars were valued in the policy. Lord Mansfield stated the rule thus: "The underwriter takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy." To illustrate the rule he gave the following example: "Suppose sea-damaged goods valued at £30 in the policy to arrive at a market where, had they arrived sound, they would have sold for £50, but arriving damaged, they only sell for £40—here is a depreciation of £10, or a fifth of their sound value; the underwriter must pay a fifth of the value in the policy, that is £6." The reason for this procedure is not difficult to understand. The underwriter contracts to give indemnity for losses arising immediately from sea perils, consequently he is to be exempt from all losses arising from fall of market, and is equally to be deprived of all gains arising from rise of market. The valuation given on valued policy and that determined by law in the case of an open policy are both independent of market fluctuation. If the amount claimed from an underwriter in case of goods arriving damaged was simply the difference between the policy valuation and the arrived damaged value, the rise or fall of the market would be an element in the latter item, and so would come into the claim against the underwriter. It would, consequently, be to the underwriter's advantage to have damaged goods arrive in a rising market, and to his disadvantage to have them arrive in a falling market. But he will be rendered independent of rise or fall of market if the measure of his loss is taken to be the proportion which the difference between the sound and damaged arrived values bears to the sound arrived

[1] 2 Burr. 1167.

value, and if this proportion is applied to the insured value declared in the policy or to the legally determined value in the case of an open policy.[1]

It turned out that in this admirable judgment Lord Mansfield assumed one point of importance, namely, that there could be no doubt about the amounts therein described by the words "sound arrived value" and "damaged arrived value." That their meaning was not free from doubt appeared in the case of *Johnson* v. *Sheddon*, 1802,[2] long known as the Brimstone case. The policy in this case covered a shipment of brimstone and shumac on board the *Caroline*, from Sicily to Hamburg. Upon a calculation by Mr. Oliphant, to whom the loss was referred by the parties for adjustment, the loss was found to amount to £76 : 7 : 4 per cent. The matter came before the court, and after decision in first instance, a new trial was moved for, on the ground that the adjuster had made a mistake in his method of calculation, inasmuch as in estimating the loss he had taken for his basis the difference between the *net* proceeds of the damaged goods and their *net* sound value, instead of taking the difference between the *gross* damaged proceeds and the *gross* sound arrived value. Three points were agreed to by both parties :—

(1) The loss to be estimated by the rule laid down in *Lewis* v. *Rucker*,[3] that the underwriter is not to be subjected to the fluctuation of the market.

(2) The loss for which the underwriter is liable is that which arises from the deterioration of the commodity by sea damage.

(3) The underwriter is not liable for any loss which may be the consequence of duties or charges to be paid after the arrival of the commodity at the place of destination.

The matter came before the Court of King's Bench, and Mr. Justice Lawrence (in what Arnould, p. 985, describes as "one of the ablest judgments ever delivered in West-

[1] As a matter of fact damaged goods *never* have a market value in the same sense that sound goods have, so that the underwriter can never be *quite* independent of considerations of market.

[2] 2 East 581. [3] 2 Burr. 1167.

minster Hall") held the true rule of adjustment to be "that the percentage or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound with the gross produce of the damaged sales." By "gross produce" Mr. Justice Lawrence meant the price including freight, duty, and landing charges. His reason for adopting this price was that he desired to get at the intrinsic value of the goods in their sound and damaged conditions at destination; for it must be borne in mind that the essence of particular average is that it is a settlement on goods which have reached destination. He said: "When a commodity has been offered for sale to one who has nothing further to pay than the sum the seller is to receive, it is the quality of the goods which, in forming a fair and rational judgment, can alone influence him in determining what he shall pay. He has nothing to do with what it may have cost the seller, and the goodness of the thing is the criterion which must regulate the price; for, being liable to no other charges, he has only to consider its intrinsic value; and therefore if a sound commodity will go as far again as a damaged commodity by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound that he will for the damaged; and so in proportion." [1]

Freight involved in Particular Average on Goods.—It is evident that in all cases in which the insured value is not below the gross sound arrived value, the assured is, by the principle established in *Lewis* v. *Rucker* [2] and *Johnson* v. *Sheddon*,[3] secured in the payment in full by the underwriter of any particular average sustained by his goods. On the other hand, for any amount by which the gross sound arrived value exceeds the insured value the assured has to bear the loss himself. As has been already explained, the gross sound arrived value includes freight, landing charges,

[1] By custom of Lloyd's particular average is adjusted on a comparison of *bonded* instead of *duty-paid* prices in claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

[2] 2 Burr. 1167. [3] 2 East 581.

and duties. But these expenses not being payable by the merchant until after the voyage is closed, are never incurred in case the vessel is totally lost before arrival. The shipper of goods has, therefore, no reason to insure these amounts against total loss of the ship or cargo. It is consequently only against the risk of the vessel's arrival with cargo so damaged as to give rise to a particular average claim that the shipper need insure the freight, landing charges, and duties. This is not a customary insurance in England, so that cases sometimes arise in which the application of Mr. Justice Lawrence's decision is felt by the merchant to involve him in some hardship. But in French policies on goods it is quite usual to find special provision for the insurance of freight payable abroad, warranted free of claim in case of the total loss of the ship; in return for this warranty the premium is generally made one-half of the rate on the goods.

In the case of goods manufactured for the consumption of one firm and adopted only for their trade, it may be impossible to arrive either by sale or by assessment at a true idea of the damage sustained by them. In such cases the damage is measured by the cost of reconditioning the goods at destination, the claim on the policy being in other respects treated in the same way as if the goods had been sold or the damage assessed.

Expenses of proving and adjusting Claim for Particular Average.—In determining whether a claim for particular average attains the franchise or not, no account is taken of anything but the actual physical damage. The clearness with which this is brought out in the French phrase, *avarie particulière matérielle* (material particular average), renders that designation superior to our shorter name "particular average." So far, expenses of survey, etc. etc., remain at the charge of the merchant himself. But if it is found that the actual material damage (diminution and deterioration) exceeds the stipulated franchise, there being evidently by that time a liability on the part of the underwriter, then the underwriter allows to the assured the sums spent in survey fees, etc., as being expenses incurred in the claim, which

were essential to the existence of the claim and therefore became part of it. On the same ground the cost of making-up or, as it is termed, adjusting the claim, is admitted when the assured employs an adjuster to make it up; but it is not (as a rule) admitted when the statement is prepared by the assured himself or by a member of his regular office staff.

On examination of adjustments of particular average on goods it will be found that these statements are simply applications of the principles explained above. The adjuster first determines from invoices and policy the insured value of the goods whose damage he is dealing with; then from account-sales or surveys he arrives at the proportion of loss sustained by the damaged goods: if this proportion exceeds the stipulated franchise he applies this proportion to the insured value he has calculated, and to the result he adds the various costs incurred in ascertaining the amount of damage and his own fee for adjustment. It follows from what has already been said respecting costs of surveys, etc., that if there is found to be a claim on only some series of the damaged goods, the proportion of the costs attaching to the goods whose damage does not attain the franchise, falls to the assured's burden not being recoverable by him from his underwriter.

Particular Average on Freight.—The most frequent occasion of claim for particular average on freight is the loss of some portion of a cargo by one of the perils insured against in the policy. For instance, take a cargo of sugar carried from Java to New York in return for freight of so much per ton payable when the cargo is delivered at New York. If the vessel meets with some disaster at sea or with bad weather it may happen that a portion, say one-half, of the cargo is lost. In such a case there is evidently a good ground for claiming from the underwriter on freight the half of the amount he has insured.

A claim may arise on a policy covering the freight of certain goods without the occurrence of a claim on the policy covering the goods themselves. For it might happen that the goods were insured f.p.a. unless the ship

be stranded, and the freight on ordinary memorandum terms. In such case, if the vessel did not strand no loss on cargo except total loss could be claimed from the underwriter, while any loss on freight exceeding 3 per cent proceeding from sea perils of any kind could be recovered from the underwriter on freight.

The ordinary terms on which freight is insured are those laid down in the memorandum, but occasionally freight is insured f.p.a. unless the ship be stranded. This holds specially of freight of salt, and it is easily understood; if it is not possible to insure the salt except f.p.a. (and this holds true of insurance on salt effected on the ordinary form of policy), it is only to be expected that the freight which can be earned only when the salt is delivered *in specie* cannot be more favourably insured.

In the discussion of total loss of freight, it was remarked that mere delay on a voyage will not constitute a claim on an ordinary policy on freight. This holds equally true as regards particular average. The loss must arise from some peril insured against.

It was also noticed that as English law takes no notice of a partial performance of a freight contract, a freight must either be earned in full by the shipowner or not earned at all. There cannot, consequently, be any claim on a freight policy for particular average arising from closing a marine venture short of destination. The nearest approach that can be got to that is a salvage loss; and such a settlement can only occur when an underwriter on the freight of cargo carried in a *foreign* ship[1] pays a total loss, the ship failing through perils of the sea to deliver her cargo at destination, and is in consequence substituted in the rights of the foreign shipowner to receive distance freight *pro rata itineris peracti*. Such a case was decided by the Court of Queen's Bench in the sense indicated, and was confirmed by the Court of Appeal (The *Canute*, *London Assurance* v. *Williams*, 1893).[2]

[1] Or on a British ship which has conferred on it *pro tempore* the rights of a foreign vessel as to distance freight.

[2] 9 Times Law Reports, 96, 257. In this case the vessel was

It is to be observed that when a vessel fails to deliver portion of her cargo, what the shipowner fails to collect is the corresponding proportion of gross freight, *i.e.* of bill of lading freight. Consequently, if the system applied to cargo is applied to freight, the proper plan of adjusting a claim on freight is to find what proportion of the total gross freight at risk is lost, and to take that proportion of the insured value as the amount payable by the underwriter. The adoption of gross value is as correct for freight as it has been found to be for cargo. For the value of the net freight on a voyage (*i.e.* the bill of lading freight less expenses of earning) depends on the length of the vessel's passage. Consequently, there would be in adjustments on net values an introduction of the very elements of time and detention which have been in other respects excluded from the contract. Besides, it is easy to conceive a case in which by the loss of a comparatively small portion of the cargo the net freight would be reduced to nothing, or even to a minus quantity. It would certainly seem absurd that a total loss could be claimable on any real interest when by far the greater part of the goods on which that interest was based completed the venture in safety.

In treating cases of loss of freight and claims on policies covering that interest, there ought to be constant reference to the contract of affreightment. In case of lump sum charters, it may be that freight is payable in full only when the *whole* cargo is delivered at destination, or that it is payable in full when *part* is delivered, provided the failure to deliver the rest has arisen from perils excepted in the charter-party. It is therefore possible that, in consequence of the terms of the charter, what would under a charter of another form constitute a claim against underwriters on freight on the ordinary policy, would not in the particular case in hand give rise to such a claim.

Similar complications may arise in connection with

British, but received distance freight in consequence of an agreement that the adjustment of liabilities between ship and cargo should be made according to the law and usage of Havannah, where the venture was broken up.

freight partially prepaid, resulting in cases such as that of *Allison* v. *Bristol Marine*, 1875-6,[1] discussed above (p. 163).

Passing from freight at risk to chartered freight, we enter on the consideration of one of the most difficult subjects in marine insurance. This will be better appreciated after examination of two important cases of recent occurrence.

In *Inman* v. *Bischoff*, House of Lords, 1882,[2] the policy on which action was taken was a policy on chartered freight. The facts of the case were as follows: "On 20th February 1879 the Inman Steamship Company chartered the *City of Paris*, to the Admiralty to convey troops to the Cape; the arrangement was to hold for three months certain, commencing 18th February 1879, and was at the Admiralty's option prolongable after the expiry of that period. One month's freight was payable on signature of the charter, and at the end of the second and of every subsequent month's service one-half of that month's freight was payable. On 22nd February the Inman Company effected an insurance on freight outstanding, risk commencing 20th February 1879 and expiring 19th May 1879, both days included. On 21st March the vessel struck a rock near the Cape of Good Hope and sustained serious injuries, resulting in her being put out of pay in terms of her charter. On 17th April the vessel was discharged from Her Majesty's service, and it was not till 14th May that she was granted a certificate of efficiency. The Inman Company made a claim on their freight policies for the freight between 21st March and 19th May, alleging that perils insured against in the policy prevented them from earning the freight that would have been earned between these dates had the vessel not been put out of pay and discharged from Her Majesty's service. The Government time charter stipulated that if the vessel became inefficient the Admiralty could make 'abatement by way of mulct out of the hire or freight.' At the first trial Lord Justice Brett decided in favour of the plaintiffs; on appeal this decision was reversed, the court being of opinion that none of the perils insured against was the *proximate* cause of the

[1] 1 App. Cas. 209. [2] 6 Q.B.D. 648; 7 App. Cas. 670.

loss, although one of them was a cause *sine qua non*. In the House of Lords both Lord Selborne and Lord Blackburn insisted on the difference between a fine or mulct, of the class for which the charter provides, and a loss of freight. As Lord Blackburn put it, 'The question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight.' The House of Lords decided that there was no loss of freight, consequently, that the underwriters on the ordinary policy were exempt from liability. Respecting the risk of fine or mulct Lord Blackburn said, 'Such a risk might very well be insured against, but it would require some special clause.'"

It appears that to entitle the assured on a time policy on chartered freight to claim for loss of time resulting from an accident caused by perils of the sea, the loss of time must have been such as to cause a loss of hire during the currency of the policy. In other words, if the vessel can perform the charter without having to stop her work for repairs, consequently without loss of hire, that performance discharges the underwriter, and he is not liable for any subsequent loss of hire which the shipowners suffer while the repairs are being effected. This is the effect of the decision in *Hough* v. *Head*, Court of Appeal, 1885.[1]

The case of the *Alps* (*Mersey Shipping Company* v. *Thames and Mersey Marine Insurance Company, Limited*, Admiralty, 1893)[2] is an interesting pendant to *Inman* v. *Bischoff*. The *Alps* was hired to charterers who paid for her use £425 per month, payment monthly in advance; the charter-party providing that "in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour of the beginning of the detention until the ship be again in an efficient state to resume her service." On 18th August 1891 the ship took fire, and was so damaged that repairs became necessary, which occupied thirteen days.

[1] 54 L.J. Q.B. 294; affirmed 55 L.J. Q.B. 43, C.A.
[2] L.R. 1893, P.D. 109.

The hire of the vessel for these thirteen days was repaid to the charterers by the shipowners. The question that came before the court was whether the shipowner was entitled under an ordinary policy on chartered freight to recover from underwriters their proper proportion of the hire. Both sides cited *Inman* v. *Bischoff*, each interpreting that case his own way. Mr. Justice Barnes, after examining the judgments in that case, concluded that "the true view to take of an insurance such as this applied to a very ordinary form of charter-party containing a very ordinary and usual clause, is to cast upon underwriters the risk of loss on freight when that clause is put into operation through the immediate action of the perils insured against."

In a more recent case (*Bedouin Steam Navigation Company* v. *Bradford*, Court of Appeal, 1893)[1] the charter-party contained a clause stipulating that "in the event of a breakdown of engines or machinery" (amongst other things), "and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire shall cease until such time as she is again in an efficient state to resume her voyage." The steamer's thrustshaft parted, and she was towed into St. Vincent, where a new shaft was fitted. The defendant, an underwriter on "freight chartered $^{\text{and}}/_{\text{or}}$ as if chartered, on board or not on board," alleged that he was not informed of the existence of such a clause in the charter or of the tenor of this particular clause. In his judgment the Master of the Rolls (Lord Esher), supported by Lords Justices Lopes and Kay, confirmed Mr. Justice Barnes' decision in favour of the assured. The Master of the Rolls said that when the plaintiffs told the defendant that it was to be an assurance on freight payable per month, they told him *in effect* that it was to be a charter with the twenty-four hours' clause in it, and it could not be held that there was any concealment of material fact.[2]

[1] 10 Times L.R. 70.

[2] It is striking that the Master of the Rolls in the *Bedouins*, and Mr. Justice Barnes in the *Alps*, should both have felt themselves forced to adopt trade custom as their guide in their efforts to find a proper connection between charterer, shipowner, and underwriter.

Particular Average on Ship.—The consideration of particular average on the third great maritime interest, the ship, is beset with certain difficulties which are peculiar to that interest. It is much more easily grasped than is particular average on freight; in fact, it is quite as tangible as particular average on goods, but it is far from being so simple. Indeed the examination of the principles and practice of adjustment of particular average on ship shows, perhaps, more clearly than anything else how strongly English law is imbued with respect for custom, or, put the other way, how fully custom has taken up in England the position elsewhere usually granted only to statute.

Franchise: Valuations.—In one respect freight and ship are alike, the conditions of average for both being decided by the memorandum: on both interests there is a franchise of 3 per cent unless the ship be stranded. As has already been explained, it has become usual to add words to the memorandum which render the sinking or burning of the vessel, or her suffering damage from collision with another ship or vessel, equivalent to stranding in extending underwriter's liability for particular average to damage under 3 per cent. In the case of steamships this provision was not found to be sufficiently favourable to the assured. The value of the vessels that now do the most important part of the world's carrying trade far exceeds the value generally prevailing when the memorandum was originally drawn; the price of what would then have been considered an enormously costly ship is no more than that of an ordinary "tramp" steamer of to-day. It has consequently become customary to give in the policy separate valuations for the hull of a steamer and for the machinery usually expressed thus:—

Hull and materials, masts, spars, sails, boats, etc., and cabin furniture . . . . . valued at £
Machinery, boilers, and everything connected therewith . . . . . valued at

£

and to add to the policy a clause of the following tenor:—

Average recoverable on each valuation as if separately insured, or on the whole, whether the average be particular or general.

Leaving aside general average for the present, it is evident that this clause extends considerably the indemnity recoverable by the assured under the name of particular average. It is to be remarked that the addition of the words "or on the whole" expressly grants to the assured indemnity for claims in which the franchise on the whole value is reached, although it may not be attained on one of the valuations. This is exactly parallel to the procedure in cargo claims under average clauses, and is in perfect agreement with the principles universally adopted in the interpretation of the policy (pp. 136, 194).

In the case of the great passenger line steamers the introduction of a second valuation has not been found sufficient, and the number has been increased to three or four. When the great cost of the cabin outfit and furniture of these vessels is borne in mind, it seems not unreasonable that this item should be treated as a separate valuation in their policies.

In indemnifying the assured for particular average on ship, the damage suffered is estimated by a method which from its nature is usually inapplicable to other interests. The fixing of the loss which falls on a policy of insurance covering freight is simply a matter of arithmetic: the amount of damage to goods is usually determined either by assessment or by sale; while in the case of ships, the measure of liability for particular average is the cost of such repairs as will put the vessel in the same state of efficiency as she was in before the accident which rendered these repairs necessary. The only parallel to this method is the charging of the cost of reconditioning goods at destination as particular average. There is some reason for this exceptional treatment of ship as contrasted with goods. For goods are exposed to the perils of the sea for only a brief period of their existence, and when the underwriter's connection with them is terminated by their arrival at destination, the indemnity he has to pay is fixed by sale or assessment of the damage: ships, although insured voyage by voyage,

or year by year, are intended to remain permanently at work at sea, and constantly exposed to sea perils, and are almost universally insured without interruption from the beginning to the end of their existence, so that it is reasonable that the payment of the cost of repairs should be taken as complete indemnity for the damage suffered by the assured.

The repairs of damage of the nature of particular average are confined to what will put the vessel in the same state of efficiency as she was in before the accident which rendered these repairs necessary. There is no reference to any other standard, whether it be the requirements of Lloyd's registry or any other classification body. Consequently, when underwriters have a claim put before them in which the repairs are said to be based on the requirements of any registry, they are entitled to go behind the recommendations of the surveyors, and to discover the actual state of the ship prior to the accident. It might happen, it actually has happened, that a casualty necessitating the repair of a ship occurred on the voyage, at the end of which the vessel was due for Lloyd's No. 2 survey. In the ordinary course of that survey she would have to be dry-docked and opened out for examination: it would obviously be unfair that all the expenses of these operations should be charged to the underwriter, a great part if not all of them being incumbent on the shipowner himself, even if his vessel went quite free of accident. This point will be treated more fully below.

Putting a vessel in the same state of efficiency as before the occurrence of an accident, does not necessarily mean the exact replacement of everything in and about her in its former position and condition; it does not mean what is called in fire insurance "reinstatement." The repair will have fulfilled all that the assured is entitled to exact if it results in making the ship, to use the words of Lowndes (Law M. I. p. 191), "as strong and durable and as good a carrier . . . a ship which shall be as fit either to keep or to sell as she was before."

Wear and Tear.—In examining the nature of the losses

for which underwriters should be liable under the common form of policy, the conclusion was reached that everything in the way of damage resulting from the essential character, natural quality, or inherent defect of the subject insured should be excluded from the operation of the policy. Now the most inevitable form of inherent defect is the one that is least perceptible in its progress, namely, *wear and tear*. It is clear that in every structure with which we are acquainted, detriment must be going on steadily without ceasing; these structures, though intended to last for years, are yet admittedly of only limited durability. This is particularly true of ships, especially of wooden ships; and if true of the hull and spars, it is evidently much more so of hawsers, cordage, and sails.

It is extremely difficult to determine where "wear and tear" ends. The perusal of hundreds of statements of particular average on ships will probably result in making the matter not clearer but rather more difficult. It is probable that in reality a very great proportion of the cases of damage suffered at sea arise neither from sea perils nor other extraordinary casualties alone, nor from wear and tear alone, but from a combination of these; or from a state of insufficiency resulting not so much from active wear and tear as from the mere effect of time on materials which were originally fully sufficient for their intended purposes. The institution of periodical surveys by the classification registries may be quoted in support of this view; these surveys are held irrespective of the history of the vessel as regards accidents, and are held at times fixed when the original class certificate is given. As an example the case of chain cables, windlasses, and hawsers may be taken. In olden days every damage or loss of these was put down to simple wear and tear, unless some strain out of the ordinary course had befallen these appliances in consequence of some peril of navigation. When a chain cable is run out with an anchor it is fulfilling the very purpose for which it was furnished. If it does not hold the ship *in ordinary weather* it has either been insufficient from the first, or having once been sufficient,

has through actual wear and tear, or the mere lapse of time, become insufficient. But the real difficulty is to say how much such a cable should be able to stand in the way of *bad* weather or *unusual* strain; anything below that standard should be called ordinary, anything above it extraordinary. In the case of cables and anchors a standard approximately of this character has been imposed on English shipowners by the Board of Trade. All vessels have to carry anchors and chain cables tested up to a strain ranging with the size of the ship. It is natural that the shipowner should consider that his fulfilment of the requirements of the Board of Trade should pass his cable as manifestly sufficient for all the strain to which it is exposed in ordinary weather. The next conclusion is that whatever weather is followed by the breaking of this cable must be extraordinary, as all usual wear and tear is covered by the Board of Trade's certificate. This is one of the results of positive enactments; on the whole, they have raised the percentage of safety, but the literal fulfilment of them does not prevent the occasional occurrence of disaster which might perhaps have been avoided had it not been for their existence. With respect to the settlements made by underwriters in cases of this character there can be no doubt that, in the words of Lowndes (Law M. I. p. 183), "this leniency may perhaps . . . be carried too far."

The same difficulty presents itself in connection with a breakdown of machinery in steamers, especially of screw shafts. A few years ago there was an epidemic of broken shafts. It seemed as if the first flight of compound-engined cargo steamers had about worn out their shafts, or rather had reduced them to such a state of tenuity that weather far short of serious storm found the weakest spot in the shaft and snapped it. No doubt some of the breaks were due to the propellers hitting floating wrecks, while others were immediately attributed to pitching of the ship and consequent racing of the engines. But the question arises, What amount of pitching and racing is to be considered ordinary pitching and racing which a seaworthy shaft ought to be able to withstand? It has often struck

those whose duty it is to examine claims for such damage, that the final break often comes on most moderate provocation. It looks in many cases as if some congenital flaw, or some slight rent originating in previous passages, has resulted either in a crack or in such a molecular condition of the metal that what seems only a slight alteration of the stresses applied to the metal is sufficient to complete the break, which is in reality the result of an accumulation of trifling shocks. The absence of what appeared sufficient reason for such breaks of screw shafts, led to the suggestion that the constant revolution of the shafts produces crystallisation in the metal, rendering it so brittle that it may snap without any additional strain from without. If this were correct, the cases it would explain would unmistakably be cases of damage due to inherent defect which, equally with wear and tear, is excluded from the liabilities of the underwriter on the ordinary policy. (Cf. Lowndes, Law M. I. p. 185, on decay or dry rot in wooden masts, and A. E. Seaton on *Mysterious Fractures in Steel* at Institute of Naval Architects, March 1896, with Prof. Arnold's remarks in discussion; also Mr. Justice Mathew in *The Ashley*, (*N. of Ireland S.S. Co.* v. *London Assurance*), Q.B.D. 8, 9, 11th May 1896).

Wooden Ships, Caulking and Metalling Clauses.—In repairs of wooden ships there was formerly much difficulty in settling whether damage was due to defective caulking or rot; and in consequence of this a clause known as the *metalling clause* was drawn to limit the responsibilities of underwriters. The clause ran:—

> Warranted free of particular average below the load water line, unless caused by grounding or by contact with some substance other than water.

This was an attempt to meet a certain class of wear and tear claims, but it is questionable if the clause could in fairness be inserted in a policy on a vessel newly caulked and metalled. Since the introduction of iron and steel for the construction of ships this clause has naturally fallen into disuse.

In addition to the limitation put to underwriters' liability in cases of wear and tear, there are others which rest upon

custom, and are universally respected, although there is no definite mention of them in the policy or in any other expression of the contract of insurance, *e.g.*—

(1) **Sails Lost.**—Sails split by the wind, or blown away while set, are not charged to underwriters unless the loss be occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent.

(2) **Rigging Chafed.**—Rigging injured by straining or chafing is not charged to underwriters, unless such injury be caused by blows of the sea, grounding, or contact, or by displacement through sea peril of the spars, channels, bulwarks, or rails.

These customs analysed will be found to rest on the recognition of two principles :—

(*a*) The underwriter is not to pay for wear and tear.

(*b*) The underwriter is not to pay for loss occurring in the proper and ordinary use of anything in the work for which it was intended.

In the case of the first custom it is presumed that any weather damaging the sails without the spars is ordinary weather, and the damage arising from it does not proceed from any extraordinary occurrence. In the second the rigging is presumed to be fulfilling its proper function in bearing the straining and chafing inseparable from any sea voyage, and any injury resulting from that is such as must occur, while "the purpose of the policy is to secure an indemnity against accidents which *may* happen, not against events which *must* happen (Lord Herschell in the *Xantho*, 1887).[1] Somewhat similar is—

(3) **Gear, etc., on Deck.**—Damage or loss of water casks or tanks carried on a ship's deck is not paid for by underwriters, nor is that of warps or other articles when improperly carried on deck.

This custom is simply an extension to the insurance of ship of the principle recognised in dealing with cargo claims, that to justify a claim on the policy the property

[1] 12 App. Cas. 503.

damaged must be in the position on the ship intended for it. When a vessel is in the act of sailing, or of arriving, or preparing for either, it is quite proper to have warps, etc., on deck ready for use: at other times only extraordinary circumstances can justify their being there.

The three customs dealt with above form part of the old "customs of Lloyd's."[1]

Among the many points of detail that have to be considered in the settlement of almost every case of particular average on ship, the following are so important as to require special attention:—

(1) **Collision Liabilities.**—The expenses borne by underwriters as particular average on ship being the proper proportion of the cost of the repairs of material damage, and of such outlays as may be incurred to effect these or to restore the ship to her owner's possession, no claim can be made against underwriters on the ship for damage done by her to persons or property. In the case of *De Vaux* v. *Salvador*, 1836,[2] the owner of a vessel brought an action against his underwriter to recover the amount he had to pay to another vessel in consequence of a collision in the Hooghly. In the Court of King's Bench it was held that he could not recover, for, as Lord Denman expressed it, the "obligation to pay was neither a *necessary* nor a proximate effect of perils of the sea, but growing out of an arbitrary provision of the law of nations."[3] The result of this

[1] Preamble to the "custom of Lloyd's" as issued by Average Adjusters' Association: "Nothing can be called a 'custom of Lloyd's' which is determined by a decision of the superior courts; for whatever is thus sanctioned rests on a ground surer than custom. A 'custom of Lloyd's,' then, must relate to a point on which the law is doubtful, or not yet defined, but as to which for practical convenience it is necessary that there should be some uniform rule. By the term is here understood the customs of English adjusting, whether as affecting general or particular average."

[2] 4 Ad. and Ell. 124.

[3] In the United States Mr. Justice Story gave a decision to the very opposite effect in *Peters* v. *Warren Insurance Company*, but in a later case Mr. Justice Curtis, in the Supreme Court of the United States, took Lord Denman's view of the matter, and Phillips (§§ 1137, 1437) states his opinion that that view seems to be "the better doctrine."

decision was that to cover collision liabilities a separate contract was framed, incorporated in the policy, and known as the collision clause, which will be dealt with subsequently. On the same principle payments for other damage to property done by the ship, and loss of life caused by her, do not form part of the liabilities of the underwriter of an ordinary policy.

(2) **Wages of Crew and Demurrage during Repairs.**—The underwriters of a ship are not charged with the wages or provisions of a crew during the time that she is detained for repair, nor with anything of the nature of demurrage. This holds equally whether the repairs are effected at the close of the voyage or at an intermediate port in the course of the voyage. But in case any members of the crew are after arrival at destination employed to do work which, unless done by them, would require the labour of workmen from outside, the amount of their wages for the time so occupied is allowed. The exclusion of demurrage from particular average on ship, and its inclusion in all claims made against other vessels for damage suffered in collision, form a striking contrast. But the contrast marks strongly the difference between liability under a contract of indemnity against the immediate results of certain named perils and liability under a relation of injury arising from the fault of another person and resulting in his payment of damages.

(3) **Temporary Repairs.**—If it is found to be for the interest of all concerned to effect only temporary repairs of damage, the shipowner is entitled to recover the cost of these repairs from his underwriters as well as the cost of the permanent repairs afterwards. In the same way he is entitled to recover the cost of repairs which have to be done over again in consequence of the work being done badly, or the repairs being effected in a manner which does not leave the ship as fit to sail or to sell as she was before the accident.

(4) **Cost of Removal for Repairs.**—With regard to the cost of removal of a vessel for repairs there are two possibilities to note :—

(*a*) If the place of repair is in the port where the damaged vessel lies, it is customary to allow the expenses

of removal to the repairing place, and from that place after repair to what would then have been the vessel's position had the necessity for repair not arisen, namely, her place of loading.

(*b*) If it is desired to remove the vessel from an outport or a distant or foreign place to her home port or other place to be repaired there, it should be shown that the removal has been done in the interest of underwriters before they are charged with any of the expense; for it is only where expenses are incurred of necessity to enable the ship to be properly repaired that the underwriters are liable for them. The desire of the shipowner to superintend in person the repairs of his vessel at her home port will not justify his removing her at underwriters' expense, nor will the whole of the expense of removal be properly chargeable to underwriters if it results in the vessel, after repair, being in a better position for future engagements than if the vessel had been repaired at her destination.

Addenda.

(5) **Dispatch: Overtime.**—It frequently occurs that in order to save time, the repair of damage is accomplished with unusual expedition, overtime, nightwork, holiday and Sunday work being resorted to in order to get the repair finished quickly. It may happen that the extra cost thus incurred is less than the charge that would otherwise have been made for longer use of the graving dock or slip, and in that case it is but reasonable that the underwriter should bear the extra cost, as it results in a saving to him. But usually such dispatch is required to enable the vessel to take up some engagement, such as a charter or her turn on the berth in a regular line. As the underwriter is not concerned in such engagements, should he be held liable to make good costs incurred solely to enable a vessel to fulfil them? If he were liable in any sense for loss of time arising from a sea peril there would be some ground for making him pay for dispatch in repairs, but as he is not (without special agreement) liable for loss of time, it seems anomalous to charge him with expenses incurred to avoid such loss. The view adopted by the most recent writers (Lowndes, Law M. I. p. 194; M'Arthur, Contract, p. 233)

is that the shipowner is entitled to recover the extra payment for dispatch, if it is no more than he would reasonably incur if he were not insured. The solution hardly appears satisfactory, for it makes an insurance liability out of an expense in the incurring of which all question of insurance has confessedly been ignored. In addition, its adoption increases or diminishes underwriter's liability for one and the same casualty, according as the ship has engagements for favourable prompt employment or unfavourable distant employment. That is to say, the dispatch is obtained for a reason which has no relation, either proximate or remote, to the material damage chargeable on the policy. It appears that the question has not yet come before the courts.

(6) **Unrepaired Damage.**—If a vessel is damaged and is not repaired, but is later on the same voyage lost, the only claim that can be made on the policy is for total loss. Similarly, if she is only partially repaired and lost later on the same voyage, no claim can be made for the repairs *not* effected (*Livie* v. *Janson*, 1810).[1] But if the loss occurs on a subsequent voyage, the underwriters on the policy for the earlier voyage are liable for the repairs of damage arising on that voyage, those on the policy for the later voyage being liable for the total loss (*Lidgett* v. *Secretan*, 1871).[2]

(7) Should a shipowner be content to accept some method of repair which will render the vessel as fit for her trade as if she were more completely repaired, but not as valuable for sale, he is entitled to claim from his underwriter an allowance for the depreciation his ship has suffered. For instance, it often happens that a frame or beam is injured in such a way that it must be renewed in its whole length, unless the shipowner agrees to have it "scarphed," a much cheaper operation, but one that leaves the ship of less value in the market. In such a case the shipowner is entitled to claim in addition to the cost of repairs an allowance for the diminution of his ship's value, provided that the sum of these two items does not exceed

[1] 12 East 648. [2] 5 C.P. 190; 6 C.P. 616.

the cost of the more complete method of repair. But it has been decided that if the ship is, after the substituted repairs, as valuable for work or sale as she was before the accident, then the indemnity received by the assured is complete, as he cannot recover more than he has lost (*Bristol Steam Navigation Company* v. *Indemnity Marine Insurance*, 1887).[1]

(8) **Concurrent Repairs.**—When repairs for which underwriters are liable are carried out at the same time as repairs on shipowner's account, certain expenses, such as dock hire, are incurred only once which, unless the repairs were carried on concurrently, would be incurred twice. In the case of the *Vancouver*, (*Marine Insurance Company* v. *China Trans-Pacific Steamship Company*, 1886[2]) two sets of repairs, shipowners' and underwriters', quite distinct, *but both necessary*, were going on in graving-dock at the same time. Three days' dock dues were saved by the joint-execution of the repairs, as the shipowners' work alone would have occupied three days, and the underwriters' alone eight days. The Court of Appeal decided that the first three days' hire should be halved, and the next five should fall entirely on the underwriters, and this decision was affirmed in the House of Lords. In the case of the *Ruabon*, 1899,[3] the House of Lords decided that when a vessel, docked *solely* for the repair of damage caused by perils insured against, is at the same time surveyed on the owner's behalf with a view to reclassification, the principle of the *Vancouver* judgment does not apply. The survey was not then necessary, it added nothing to the time spent in dock or the cost of the repairs.

Thirds Deducted.—After determining whether any liability attaches to underwriters in the ordinary form of policy for the repair of certain damage, it becomes necessary to inquire to what extent that liability goes. Up till the time when iron ships were introduced, the invariable practice in England was that unless the vessel was new a deduction of one-third was made from the cost of the repairs, this

[1] 6 Asp. Mar. L.C. 173. [2] 11 App. Cas. 573.
[3] 9 Asp. Mar. L.C. 2.

deduction being called an "allowance of one-third new for old." See the remarks of Mr. Justice Brett in *Lohre* v. *Aitchison*, 1877, 1879.[1] If this is examined it will turn out to be merely another application of the principle already discussed above, namely, that the underwriter is not to be liable for wear and tear. The meaning of excepting from this deduction all repairs to new vessels (or, as the clause was sometimes worded, vessels on their first voyage, or vessels within eighteen months after launching) was that it was not supposed that ordinary use of the hull and materials of a new ship for the first voyage, or for less than eighteen months, would deteriorate them to any appreciable extent. The only cases in which the clause is now customary are those of iron ships getting on in years, in which it is usual for underwriters to stipulate that thirds shall be deducted from the repairs of the parts of the ship that are not iron. The clause runs :—

> In event of claim, no one-third new for old to be deducted from the cost of ironwork repairs of hull, masts, or spars.

In cases in which it is agreed that absolutely no thirds shall be deducted this is expressed in a clause like the following :—

> Average payable on each valuation or on the whole without deduction of thirds, new for old, whether the average be particular or general.

Since iron and steel have displaced wood as the material for shipbuilding, the importance of the deduction of thirds is much curtailed by the almost universal adoption in policies of clauses rendering underwriters liable for these thirds,[2] but as regards the ship underwriter's liability in respect of general average it is still of effect. In the clause last quoted reference is made to this, so that frequently in statements of average an item occurs, "ship's proportion of thirds deducted in general average." But in the absence of any such clause the practice is based on the custom of

[1] 2 Q.B.D. 501 ; 3 Q.B.D. 558.

[2] But see Mr. Justice Willes in *Lidgett* v. *Secretan*, 1871.

Lloyd's as amended by the Association of Average Adjusters 1890, 1891, viz. :—

The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions :—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving-dock expenses and removals, cartages, use of shears, stages, and graving-dock materials.

It does not apply to a ship's first voyage.[1]

Old Materials.—Where damage is repaired by replacing old materials by new the value of the old is credited to the underwriter. This credit is in England entered *after* the deduction of the third from the cost of the new ; in America *before* the deduction ; the difference to the underwriter is one-third of the value of the old materials.

Incidental Expenses.—As the repairing of a vessel at a port other than her home port involves the shipowner in certain expenses for the superintendence of repairs, these are allowed by underwriters when the cost of repairs is such as to constitute a claim on the policy. If a vessel is repaired at her home port no charge is admitted for the services of a superintendent in the permanent employment of the shipowner. Wherever the repairs are executed no amount is allowed to the shipowner as commission, but bank commission on the amount of the disbursement is paid ; nothing is allowed to him for payments made or services rendered at the port where he resides.

The costs of surveys and adjustment are apportioned between owner and underwriter over the interests concerned.

Adjustment.—It is evident from the preceding that the task of separating the items of account that should be charged to the merchant and shipowner from those that should fall in whole or in part on the underwriter is one that demands great care and skill. The result of the difficulty of drawing up such an account is that it has become necessary to found a profession of specialists who devote

[1] But the word *voyage* is very ambiguous ; *vide* p. 236.

themselves entirely to the adjustment of marine losses. They dissect the accounts item by item, apportioning the amounts (in the case of a particular average on ship) between ship, ship less one-third, and owner. In the end all that is chargeable to the two former heads is apportioned over the insured value of the ship, each underwriter paying the same proportion of the amount that his subscription bears to the insured value of the ship. No account is taken of the actual value of the ship as distinguished from the insured value, ship being treated differently from goods in that respect.

Summary of Documents.—For the substantiation of a claim for particular average the following documents are required :—

(1) Protest of master or log-book.
(2) Set of bills of lading (cargo claims).
(3) Policy or certificate of insurance (endorsed if necessary).
(4) Certified statements in detail of actual cash value at destination, of goods in *damaged* state, all charges paid.
Certified statements in detail of sound value at destination of goods on same day, all charges paid.
Or original vouchers of costs of repair of ship, all discounts, rebates, allowances, and returns deducted.
(5) In United States, subrogation to underwriters of damaged goods.

CHAPTER XIII

PARTICULAR CHARGES: SUING AND LABOURING EXPENSES

Particular Charges.—Expenses incurred in reconditioning cargo at destination have already been discussed as a form of particular average. Such expenses are sometimes incurred at an intermediate point of the voyage. In the absence of any special contract regarding costs of reconditioning, it seems to be equitable that they should be borne by the person who would have been liable for the damage which was prevented or diminished by the reconditioning.

Other expenses may be incurred at an intermediate port for the preservation or recovery of the property insured, besides reconditioning expenses; such are warehouse rent, cost of reshipping, cost of forwarding.

In the case of *Kidston* v. *Empire Marine*, 1866 and 1867[1] (see below, p. 223), the jury found that expenses of this character are known as "particular charges," and that they are in their nature entirely distinct from particular average, the latter denoting merely actual damage (diminution and/or deterioration), but not expenses incurred in recovering or saving the property.[2] As these expenses are not particular average they are not excluded by the memorandum or any other equivalent clause from the liabilities of the underwriter, and for the same reason their incidence is not

[1] L.R. 1 C.P. 535; L.R. 2 C.P. 357.

[2] This distinction in English law corresponds to the distinction drawn in France between "avarie particulière *matérielle*" and "avarie particulière *en frais*."

limited by any consideration of franchise. These expenses are also known as "special charges."

It has already been noticed (p. 187) that the latest form of the F.P.A. clause contains the words :—

> Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable.

The effect of stating *nominatim* warehouse rent, reshipping, and forwarding as special charges for which liability is assumed is to exclude from the operation of the clause all other special or particular charges, such as reconditioning. Other forms of the clause occur which give a much wider extent to the underwriter's liability, for instance, one which runs—

> To pay warehousing, forwarding, and other special charges if incurred.

Under this a policy warranted F.P.A. would be subject to claim for even such special charges as are incurred to avert damage of the nature of particular average. This form of the clause, therefore, seems to go beyond what was originally the intention of assured and underwriter in the arrangement of the insurance on F.P.A. terms.[1]

If particular charges are the direct outcome of a peril insured against they are recoverable from the underwriter.

Sue and Labour Clause.—Particular charges are also recoverable on the policy in case they are incurred under the circumstances detailed in the sue and labour clause (see p. 120), viz.—

[1] In *Meyer* v. *Ralli*, 1876, 1 C.P.D. 358, in an action on a policy covering a cargo of rye, F.P.A., it was held that underwriters were liable for the amount of expenses necessarily incurred to avert a total loss on that part of the cargo which, after reconditioning, was capable of being forwarded to destination.

In *Great India Peninsula Railway Company* v. *Saunders*, 1861, 30 L.J. Q.B. 218, forwarding charges on railway iron, insured F.P.A., were held not to be recoverable from underwriters as they were not incurred to avert a total loss on the iron.

And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof the said company will contribute in proportion to the sum herein assured.

Probably the best way to arrive at a knowledge of the import of the clause is to examine the three leading cases connected with it.

(1) In *Kidston* v. *Empire Marine Insurance Company*, 1866 and 1867,[1] the action was brought on a policy insuring chartered freight free of particular average, but with the sue and labour clause. The vessel was condemned at an intermediate port, but a ship was found to take the cargo on to destination at an expense less than the original freight. The assured claimed from the underwriters their proportion of the costs incurred in so forwarding the cargo, on the ground that by this forwarding they averted the danger of a total loss on the policy; they based their claim on the words of the sue and labour clause, and were held to be in the right. The expenses in question were incurred on behalf of one particular interest, freight, to avert what would otherwise have been a loss on the policy insuring that interest, and the steps taken, resulting in the incurring of these expenses, were taken by the assured, their factors, servants, or assigns.

It may be remarked that in the wording of this clause in the policy there is an almost unavoidable ambiguity. The words run—

For, in, and about the defence, safeguard, *and* recovery of the said goods *and* merchandises *and* ship, or any part thereof.

This would almost make it appear (and were it not for the words "or any part thereof" it certainly would appear) that the clause was intended to cover only cases in which efforts were made to recover both ship *and* cargo. But this is not correct, it is not in consonance with the decisions. It must be remembered that the policy was originally

[1] L.R. 1 C.P. 535; L.R. 2 C.P. 357.

drawn to cover both ship and cargo, the only interests then known to insurance; the *and* was originally used in this clause to make the policy include all the interests (goods and merchandise and ship) that may be insured; it extends the sphere within which the *possible* obligations of the underwriter may operate, but it is held that in any *actual* case only one interest need be concerned. It would therefore be more correct to word the clause—

Goods *or* merchandises *or* ship *or* freight *or* etc., or any part thereof.

(2) In *Aitchison* v. *Lohre*, House of Lords, 1879,[1] the action was brought on a policy insuring the vessel *Crimea*. She sustained much damage from sea perils, so that she became leaky, water-logged, helpless, innavigable, and in danger of being totally lost. In this state those on board signalled to the steamer *Texas* for assistance, and by her the ship was towed into Queenstown without agreement as to remuneration. The repair or estimate for repair of the material damage to the vessel amounted to over 100 per cent. The Court of Queen's Bench held that the payment of 100 per cent absolved the underwriters as far as material damage was concerned, and dismissed a further claim amounting to £500 (for general average), and one for salvage. The Court of Appeal confirmed the sufficiency of the 100 per cent payment for material damage, and allowed the claims for general average and salvage. The House of Lords affirmed the sufficiency of the 100 per cent payment for material damage, and disallowed the claim made under the sue and labour clause for salvage. The principal judgment in the House of Lords was pronounced by Lord Blackburn. He gave as his reason for disagreeing from the Court of Appeal his view that, as regards the insurance of a ship, the sue and labour clause was intended to encourage the personal efforts of the assured, his servants, etc., for the preservation of the vessel, by providing that underwriters should bear the expense incurred in those

[1] 4 App. Cas. 755.

persons' efforts; that it was not intended to operate, and did not, in fact, operate to provide for the expenses or reward of such other persons as might, for the sake of what recompense the Admiralty Court might eventually give them, perform services to the vessel on their own account and for their own profit. "The owners of the *Texas* did the labour here, not as agents of the assured, and to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Eyre, C. J., in *Nicholson* v. *Chapman*, 1793,[1] gives them a claim against the property saved by their exertions, and a lien on it, and that quite irrespective of whether there is an insurance or not, or whether if there be a policy of insurance it contains the suing and labouring clause or not."

The length to which this limitation of the effect of the clause has been pushed may be learnt from the decision of *Uzielli* v. *Boston Marine*, 1884.[2] In this case the plaintiffs were underwriters who had reinsured a risk with the defendants on a policy covering the risk of total loss only, and containing the sue and labour clause. The plaintiffs claimed under the sue and labour clause expenses incurred by their original assured in trying to save a venture, which, however, became a total loss. It was held that on the reinsurance policy there was liability for the total loss, but not for the suing and labouring expenses, because these were incurred by the original assured, who were *not* the factors, servants, or assigns of the assured in the reinsurance policy, *i.e.* the original underwriters.

(3) In *Dixon* v. *Whitworth*, 1879 and 1880,[3] the amount that can be recovered under the sue and labour clause is dealt with. The plaintiff contracted to transport Cleopatra's Needle from Alexandria to London for £10,000. He insured the obelisk and the vessel in which it was stowed against total loss and the risks covered by the sue and labour clause; he valued vessel and obelisk at £4000 in his policies, the sum insured on which amounted to £3000. The vessel

[1] 2 H.B. 254. [2] L.R. 15 Q.B.D. 11.
[3] L.R. 4 C.P.D. 371.

and obelisk were towed by a steamer which had to cast them off in the Bay of Biscay in consequence of a severe storm. Later they were picked up by another steamer, taken into Ferrol, and ultimately towed to London. The Admiralty Court awarded £2000 for salvage, valuing the Needle and the vessel at £25,000. Mr. Dixon claimed from his policies under the sue and labour clause £1500, being the same proportion of £2000 that the sum insured, £3000, bears to the value named on the policy £4000. In this contention he was supported by Mr. Justice Lindley. The defendant appealed, when it was decided that he was not liable to repay to the assured any part of the £2000 awarded as salvage; the ground being that as the salvors were not in the service of the assured there was no liability under the sue and labour clause of the policy.[1]

Addenda.

Summary.—The sue and labour clause is therefore an additional contract, supplementary to the total loss and particular average contract between assured and underwriter, referring solely to the separate interest specified in the policy, and dealing with no expenses but those incurred by the factors, servants, or assigns of the person protected by the policy. Of course it is always understood that the expenses are not excessive in amount, and not for work undertaken in a foolhardy or imprudent way.

It is evident that the expenses embraced under the sue and labour clause are after all but a very limited class of those that may be incurred to safeguard property. For it might be that the property insured could not be saved except by taking steps to save other property not insured on the same policy. Similarly, it might be impossible to save cargo without ship or ship without cargo. It might be that the only person capable of taking the steps necessary to save all interests (or any) is not the agent of any one assured anywhere, but is a man who is ready to do the work on conditions of hire or share of values saved, or a lump sum paid down. If the assistance thus proffered is accepted, or if the operations are for the common benefit of

[1] See p. 224 *re Aitchison* v. *Lohre*.

the whole venture, the expenses are no longer recoverable from underwriters under the sue and labour clause, for the expenses are not special, but common to several if not to all interests in the venture; they are not particular, but general; they are not the payments of servants or factors, but the recompense of salvors; they are not suing and labouring expenses, but they are *General Average* expenditures. They will be discussed later under the heading of "General Average."

CHAPTER XIV

INSURANCES ON TIME: TIME POLICIES

Insurances on Time.—The discussions contained in the preceding pages have referred to the nature and obligations of the contract of marine insurance as embodied in the ordinary form of *voyage* policy on goods and on ship. The only other usual form of policy is the *time* policy. The system of insuring for a period of time has, on the evidence of the Ordinance of Louis XIV. (Tit. vi., Art. 7), prevailed for at least two centuries. It is worth noting that the ordinance provides for the insurance on time of both ships and cargoes, together or separately (*conjointement ou séparément*).

Insurance of Goods on Time.—The insurance of goods on time is of a somewhat different character from the insurances so far discussed. Goods have so far been considered as in transit from one port to another, so that the specification of any particular time during which they are at risk is unnecessary. But it was specially stated above (p. 41) that a voyage insurance on goods at and from one port to another, with leave to call at intermediate ports, does not cover the goods if the ship is used either at loading, calling, or discharging port as a mere storehouse. Take, for instance, vessels kept lying at port of call waiting for orders to proceed to destination. The cause of delay in getting orders is usually the state of the market, and the delay is consequently far more than is required for merely getting the orders for which the ship originally put in. Consequently, unless the cargo-owner desires himself to run

the risk of loss during this extraordinary delay at port of call, he should specially insure the cargo for the period during which the vessel is thus extraordinarily delayed. The same principle regulates the period for which the cargo is covered at the ports of loading and discharge ; for any period exceeding what is the reasonable time for loading or discharging, according to the custom of the port where the loading or discharge occurs, the assured cannot claim the protection of his voyage policy, and if he does not wish himself to bear the burden of the risk for this period he must effect a special insurance.

Open Covers.—There are other forms of time insurance on goods. The one that first occurs is the ordinary open cover. It is a kind of floating contract covering so much per vessel irrespective of the amount which has already been declared by other vessels. Such a document usually runs a year ; or, to use the technical form, the sailings of the vessels declared on the policy are warranted to occur not later than 30th June or 31st December of a named year.

In every case with which the writer is acquainted the open cover is a mere document of honour ; it is an unstamped undertaking given by the underwriter without receipt of anything of the nature of consideration. In it the underwriter undertakes to issue stamped policies for an amount not exceeding a named sum by every vessel, sailing before a fixed date, of specified class, size, or character in which the assured has interest to insure, the rate of premium being either stated definitely or as "to be agreed." The open cover also usually contains a clause providing for its cancellation by either of the parties on giving notice, ordinarily of one month's duration. This kind of document is nothing but a perpetual cover-note running without break between certain dates. Like a cover-note it is an honour document not enforceable in any court of law, but equally with the cover-note it is an undertaking to issue a stamped enforceable document for a consideration in some way specified. But the stamped enforceable documents are in every respect ordinary voyage policies without any special

significance arising out of their origin in what is really a time contract.

Time Policy on Goods.—But there are cases in which the contract of insurance on goods is actually embodied in a time policy, such are the insurances on effects of captains and officers of steamers running in regular employments. From the nature of the interest insured it is almost certain that some of the articles (clothing, etc.) insured at the beginning of the period are during the currency of the policy replaced by others of the same kind. So far as the writer is aware no question of the attachment of the policy to these later acquired effects has ever arisen, and it seems hardly likely that the question will ever arise in any case of *bonâ fide* insurance. But this consideration is useful as affording a stepping-stone to an insurance of a similar character which might be adopted by a merchant.

Suppose a merchant is in the habit of shipping weekly from London to New York about £2000 worth of goods; he would have in the year fifty-two risks of £2000 each. These he could insure by fifty-two separate policies of £2000 each, or by one policy covering £2000 on each shipment made by the merchant, one a week for the year. This would be a time policy, and to be legal it must not extend beyond twelve months (see p. 20).[1] There are two possible ways of working a policy like this:—

(1) It might be arranged that no shipment should exceed £2000, and that the underwriter should make a return of premium for the amount by which the value of any shipment fell short of £2000: *e.g.* a return of premium on £580 if the shipment amounted only to £1420, on £400 for a shipment of £1600, etc. etc.[2] This system would give to the assured a policy covering an actual insurable

[1] The requirements of the Stamp Act would be *fully* met by a payment of 3d. per cent on £104,000. Possibly, as the policy is a time policy, 6d. per cent on £2000 *would* suffice; or, taking the passage at twelve days, there would be on an average two shipments always at risk, *i.e.* £4000, so that 6d. per cent on £4000 *might* be taken as *ample* payment of stamp duty on this policy regarded as a time policy.

[2] In such cases the Revenue Authorities would probably consent to a return of the proportionate amount of stamp duty.

interest, the amount of which could always be substantiated in a court of law.

(2) There might be no arrangement for return of premium, in which case the underwriter would nevertheless be entitled to ask for proof of amount of interest in case claim were made against him.

Floating Policy.—The ordinary floating policy on goods is not strictly speaking a time policy; it is really a consolidation of a series of voyage policies. The amount is the aggregate amount of various shipments declared on the policy; the voyages covered are those stated in the text of the policy, and the stamp ought to be 3d. on every £100, or fraction of £100, contained in the insured value of each separate shipment. The mention of any time within which the policy must be used up is merely an underwriter's device to make sure that the amount of his liability in any one year is definitely ascertained. No provision of the Stamp Act is broken by extending the period within which declarations may be made.

These are the usual forms of insurance common in England which may with more or less accuracy be described as time insurances on goods. On the Continent,[1] especially in manufacturing districts at some distance from the seaboard, the needs of commercial men have led to the completer elaboration of time policies on goods. There it is often impossible to name the vessel which will convey the goods to their destination over sea, and the goods pass from the maker's and owner's control within a short distance of the factory door. One of the most interesting forms of policy arising out of these circumstances is that common in Switzerland under the name of "Pauschal-police." By it insurance is effected on all the shipments of goods made by the assured on certain voyages or to certain destinations, not exceeding a fixed amount per diem in return for a certain fixed premium; for instance, "on all goods which happen to be in transit on one and the same day from A. to B., C., D., or E., and *vice versâ*, the company hereby insures the sum of one million francs as their aggregate value, in return for an annual premium of four per mille, that is, 4000 francs." In such policies the maximum line in any one con-

[1] And in the United States of America.

veyance is usually 50,000 francs (£2000). In case of loss or damage the assured has to show from his books, etc., the value of all his goods in transit on the day of the accident; in case their value exceeds the amount insured the company is liable only for the proportion that the amount insured bears to the total value in transit. The want of such policies will probably never be felt in England where the distance from sea-board to factory is so small that it is only on the rarest occasions that the exporter cannot learn the name of the ship taking his goods, and the railway and cartage risk is so short as hardly to call for insurance. But it will be wonderful if the Pauschal policy does not take hold in America and Russia, where it seems to be as much needed as in Central Europe.

Disbursements insured on Time.—Of late years it has become usual for amounts to be insured in connection with ships and steamers under the name of disbursements. There are two things described as disbursements:—

(1) Cash actually paid or to be paid by the shipowner or amount of obligations definitely incurred by him, to enable his vessel to earn a freight on completion of her voyage.

(2) Sums which the shipowner insures on his venture in addition to what he covers as value of ship and of freight, but irrespective of any particular item of expenditure or obligation.

Insurances on the second class are not always viewed with favour; they usually mean simply that the shipowner adds to the insured value of his venture without altering the valuation in his policies. And when disbursements are insured on time, as is nearly always the method adopted in the case of steamers, it is evident that they can scarcely be insurances of the first-named kind of interest. In consequence such insurances are usually done with the condition, "full interest admitted," which at once reduces the policy to the level of a mere honour document.[1]

Freight insured on Time.—When a vessel is chartered on time, the shipowner is evidently exposed to loss by perils of the sea, etc., of the hire for the period for which

[1] They are usually effected against Total Loss Only; and important questions arise as to the interest whose total loss constitutes a total loss on disbursements.

the vessel is chartered. The interest he has the right to insure depends on the terms of the charter: he has no right to insure sums which under charter-party he is entitled to receive whether the ship is lost or not.

Diminishing Clause.—If the hire in such a case is paid month by month, as is very ordinary, the amount at risk is diminished month by month by the amount of the monthly hire. There is, therefore, a great difference between the risk run by the shipowner when the freight is payable by monthly instalments and when it is only payable at the completion of the engagement. In time charters the method of payment by monthly instalments is now so usual that underwriters insuring freight under such charters generally employ a *diminishing clause* by which the risk is reduced monthly as payment of freight accrues.

But freight is also insured, "chartered or, as if chartered, on board or not on board." That is to say, the underwriter insures a sum on freight whether the vessel is under engagement or not, carrying cargo or not, and whether the cargo has already paid freight or not. In the case of steamers such insurances are done on time. If, as sometimes happens, the words "full interest admitted" are added to the policies in which these insurances are expressed, the policies being wager policies become simply honour documents, and are of no value in any court in England (see p. 77).

Ships insured on Time.—Turning to the consideration of the insurance of vessels on time, it may at once be remarked that it is only rarely that sailers are insured in this way, unless when they are detained at port of loading, call, or discharge for a period exceeding that reasonably needed for loading, calling, or discharging.[1] Insurance on time does not well adapt itself to sailers with their long voyages of 120 to 200 days; though some sailers engaged in regular trade on short voyages (*e.g.* tank petroleum-carrying sailers from New York to Antwerp) are covered in this way. But it is specially adapted to steamers, which make more passages and quicker runs, so many and so short, indeed, that without some such system as that of

[1] But in America and especially in France there is now (1903) a growing tendency to insure sailers on time.

insurance on time there would be great difficulty in getting the insurance to keep up with the voyages covered.

Steamers' Time Policy Form.—The form of policy on steamers for time is the ordinary Lloyd's voyage form with the addition of three special clauses :—

(1) The time wording, with its supplement the continuation clause.

(2) The separate valuations.

(3) The return clause.

(1) *Time Wording.*— The time wording follows the words "at and from," being inserted in the place where in a voyage policy the details of the voyage are given. It runs in a formula that may almost be taken as stereotyped :—

say for and during the space of calendar months commencing

(beginning and ending with Greenwich mean time), as employment may offer, in port or at sea, in docks or graving-docks, and on ways, gridirons, pontoons, at all times, in all places, and on all occasions and services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow or assist vessels or craft in all situations, and to be towed and to go on trial trips. With liberty to discharge, exchange, and take on board goods, specie, passengers, and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle, etc., on deck or otherwise, but warranted free from any claim in respect of jettison of cattle or goods carried on deck.

On examination this wording will be found almost exactly similar in construction to the clause in the policy enumerating the perils insured against. First come definite details, then general words. To these are added a special clause naming one particular class of risks, towage, and salvage, and being towed. It looks as if the words referring to these and to trial trips have been added in consequence of some difficulty — experienced or anticipated — about the application of the words "employment, services, and trades" to towage in cases where the vessel insured is not notoriously a tug, and to trial trips, which are exceptional things outside a steamer's ordinary work, and are, in fact, not

"employment" except in the shipbuilder's and engineer's sense. An additional reason for mentioning these is that this is the wording of a steamer's policy, and towage and trial trips are peculiar to steamers. But as a vessel, though a steamer, may find occasion or even necessity to use her sail power—indeed the policy says in as many words "under steam or sail"—she may need the assistance of a tug just as if she were a sailer. For such cases, and for the frequent occasions on which steamers are moved in dock by tugs, the words "to be towed" have been added. Next comes a very important clause limiting the application to a time policy of the idea "deviation" (already considered in the discussion of the voyage form), and one in which the underwriter grants permission to carry goods, live cattle, etc., without prejudice to the steamer's policy, but without addition to its liability. The intention of the whole is clear: it is to cover the vessel on all occasions and under all circumstances whatsoever within a definite period of time. To make the range of the policy quite clear the period is stated in calendar months, commencing at a named date, to begin and end not with the time that may prevail at the places where the vessel may be on these occasions, but with the standard English time, Greenwich mean time. This prevents any dispute between assured and underwriter as to the exact moment of commencement or lapse of a policy, be the vessel at home or abroad.

Since the judgment of Lord Esher, M.R., in *Stewart* v. *Merchants Marine*, 1885,[1] the law is that, as far as regards the memorandum in a time policy, the provisions of franchise and of sinking, stranding and burning, refer not to the whole time insured, but to each separate voyage. Previous to that decision underwriters were in the habit of using the following clause, calling it the *Non-cumulative Clause*:—

> The warranty and conditions as to average under 3 per cent to be applicable to each voyage as if separately insured, and not to the whole time insured.

[1] L.R. 16 Q.B.D. 619.

Some underwriters continue the use of it still. In connection with this a difficulty of great practical importance repeatedly occurs: neither in the decision of *Stewart* v. *Merchants Marine*,[1] nor of any other case, is any definition of "voyage" to be found. Various attempts have been made to supply this want, and the following is the definition given in the 1903 time clauses :—

The warranty and conditions as to average under 3 per cent to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods, to be selected by the assured when making up the claim, viz.: at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo, or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair, such sailing shall not be deemed to be a sailing for a loading port, although she loads at the repairing port. In calculating the 3 per cent above referred to, particular average occurring outside the period covered by this policy may be added to particular average occurring within such period, provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding policy.

Continuation Clause.—A vessel might at the close of her time policy be known to be at sea in a damaged condition, or there might be reason to fear that she was lost. In such circumstances, if the shipowner had to go to his underwriters to insure for another period he might find it impossible —either actually or commercially—to effect such insurance. He would thus be put in a worse position than if he had insured voyage by voyage.

To prevent such contingencies a clause has been devised called the Continuation Clause. In the Institute Time Clauses of 1903 the wording adopted for this clause is as follows :—

[1] L.R. 16 Q.B.D. 619.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

The continuation clause is thus in effect a supplementary agreement to prolong, in certain circumstances, the insurance on a vessel after the expiry of the period agreed upon and until arrival at destination. In cases where the original period is twelve months this would appear to conflict with the provisions of the Stamp Act of 1891, § 93 (see p. 20, ll. 15 and 16), and for many years it was the practice of underwriters to print their continuation clause on an attached slip (which in the case of extremely careful assured and underwriters was not even gummed to the policy, but only pinned on), so that, in case the policy had to be produced in court, the clause could be removed without mutilation of the policy, which could then be used in an action without any chance of invalidation in consequence of infringement of the Stamp Acts. But any such arrangement is necessarily unsatisfactory. Fortunately the revenue authorities allowed themselves to be persuaded of the commercial necessity of some arrangement for the benefit of the assured such as is contained in the clause quoted above. They were also induced to believe that both assured and underwriters were willing, indeed anxious, to fulfil every requirement of the revenue authorities, and that both parties to the contract of insurance desired to be in a position to issue and to accept documents which satisfy every requirement of the State in all its branches. For many years there were questionings and mild agitations on this matter, and in 1901 things came to a head. The Finance Act of 1901 (1 Edw. VII. ch. 7) legalised the continuation clause by the following provisions:—

PART II.—STAMPS

II.—(1) Notwithstanding anything contained in the Stamp Act, 1901, a policy of sea insurance made for time may contain a continuation clause as defined in this section, and such a policy shall not be invalid on the ground only that by reason of the continuation clause it may become available for a period exceeding twelve months.

(2) There shall be charged on a policy of sea insurance containing such a continuation clause a stamp duty of sixpence in addition to the stamp duty which is otherwise chargeable on the policy.

(3) If the risk covered by the continuation clause attaches, and a new policy is not issued covering the risk, the continuation clause shall be deemed a new and separate contract of sea insurance expressed in the policy in which it is contained, but not covered by the stamp thereon, and the policy shall be stamped in respect of that contract accordingly, but may be so stamped without penalty at any time not exceeding thirty days after the risk has so attached.

(4) For the purposes of this section, the expression "continuation clause" means an agreement to the following or the like effect, namely, that in event of the ship being at sea or the voyage not otherwise completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days.

Assured and underwriter alike express "for this relief, much thanks." Each party has resolved that no advantage shall be taken of the fact that no decisive interpretation of the word *voyage* has been given by the Courts: both have determined to meet every requirement of the revenue authorities in the most liberal spirit, in order to be sure that the insurance document issued by the one and accepted by the other shall be perfectly indefeasible as far as completely correct observance of revenue requirements can render it so.

Presumption of Loss.—There is one important case on the time wording of a policy which lapsed in the course of a voyage, *Reid* v. *Standard Marine*, 1886,[1] before Mr. Justice Field and a special jury. In this case a twelve months' policy lapsed eighteen days after the vessel started on a twenty-five days' voyage. The policy was not renewed nor sought to be renewed, and the vessel was never again heard of. No direct evidence of the date of her loss was obtainable. It was held that the assured is not bound to *prove* that the loss occurred during the currency of the policy, and that if the evidence points to the probability of the vessel's loss before the date of the lapse of the policy, the underwriters are liable to pay the amounts insured by them under their policies.

[1] 2 Times L.R. 870.

(2) *Valuations.*—The separate valuations clearly indicate the inadequacy of the old form of policy to the requirements of modern trade. In treating of particular average we had to deal with a 3 per cent franchise on ship. With steamers ranging in value from £50,000 to £500,000, the insertion of this amount in the policy as the valuation would prevent the recovery by the shipowner of any claim for particular average not reaching £1500 in the case of the lower value, and £15,000 in the higher. This is a liability which no shipowner who desires the protection of insurance would dream of taking upon himself. Consequently the expedient was adopted of breaking up the whole value into two or more items, each termed a valuation, and of inserting in the policy a clause :[1]—

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

In steamers of moderate value the valuations are usually two :—

(1) Hull and materials, masts, spars, sails, boats, etc., and cabin furniture (*i.e.* the ship and its gear regarded as a sailer).

(2) Machinery, boilers, and everything connected therewith (*i.e.* the whole distinctive gear and outfit of a steamer).

The great passenger liners, when insured, are covered by policies with as many as four or even more valuations. The value of their cabin furniture alone is as much as that of a ship of respectable size ; and in addition to the ordinary propelling engines, there are all kinds of subsidiary machines on board—electric light engines, dynamos and fittings, secondary pumping engines, machinery for refrigerating or ice-chambers, for artificial ventilation, and sundry other gear. But still, as a rule, English underwriters retain in their policy on steamers on time the old 3 per cent franchise, although they occasionally substitute 1 per cent or a lump

[1] For the meaning of "Hull and Machinery," see Lord Esher in *Roddick* v. *Indemnity M. M. Ins. Co.*, Ct. Appeal, June 1895, 11 Times L. R. 480.

sum, say £500, as the minimum limit of liability. The practice of the Mutual Insurance Clubs of the north-east coast is to pay all claims for average exceeding 1 per cent. In former years this practice was to a limited extent adopted by underwriters at Lloyd's and elsewhere, but recently that course has been almost entirely abandoned. It was found that the reduction of the franchise to even 1 per cent was not all that was required by many steamship-owners, who desired to protect themselves against every loss, however small. They founded mutual associations worked on the assessment principle, called Small Damage Clubs, which reimburse to owners any loss excluded from the ordinary policy by the condition of franchise whether that be 3 or 1 per cent. The existence of these facilities for insurance of small damage has deprived the franchise of all its moral value: there is no longer any certainty that the shipowner runs any part of the risk himself. The franchise is now nothing but an expression of the minimum limit of liability on the policy in which it appears. As we have already seen, something of the same kind has happened with the deduction for thirds which used to prevail universally.

The fact is that shipowning as a business has entirely changed in character since the adoption of steam in the ordinary carrying trade of the world. The values exposed to loss have so much increased that it would be impossible for the average steamship-owner to run the risks which the shipowner used to run. Then, increasing competition has reduced the margin of profit so much that he can less than ever afford to run serious risks uncovered. Lastly, free advantage has been taken of the facilities offered by capitalists for the financing of fleets of steamers. The lenders naturally require full protection against loss, so that again the altered state of trade is the cause of changes in the methods of insurance.

(3) *The Return Clause.* It is evident that if the premium on a time risk is fixed on the supposition that the vessel is to be at work during the whole duration of the insurance—either actually carrying cargo at sea, or loading or discharging in port—some provision may fairly be made by the assured

for the reduction of the premium in case the vessel does not find employment of this continuous nature. Such provision is embodied in the return clause. There is great diversity of wording in the different forms of this clause. Mr. Owen (*Notes and Clauses*, pp. 121 to 123) gives about a dozen varieties. But the main content of all is that when for a stipulated number of consecutive days, usually thirty, the vessel is in the comparative safety of dock or port,[1] although still remaining for the modified perils at the risk of the underwriters, a return is made to the assured of so much per cent per period. Under some forms of the clause the vessel has merely to be in port for the stipulated period to justify claim for the return; under others she must remain unemployed, or be laid up and not be under average. It is also usual to stipulate that no amount of the nature of return be paid unless the vessel reaches the close of the policy without the occurrence of a total loss, actual or constructive; and it is consequently not usual to credit returns for laying up until the policy has expired. This is secured by the addition of the words "and arrival" at the end of the return clause.

It appears equally equitable that if, for some valid reason or other, the insurance be cancelled there should be a return to the assured for the period during which no risk attaches to the underwriter, unless the vessel is actually or constructively a total loss. The provisions for the laid-up return and the cancelling return are usually contained in one clause, as for instance—

To return per cent for every consecutive days the vessel may be laid up in port or in dock, the vessel during such period being at the risk of the underwriters; and per cent for every days of unexpired time on cancelling and arrival.

Or

To return { per cent for each uncommenced month if it be mutually agreed to cancel this Policy. / As follows for each consecutive thirty days the vessel may be laid up in port, viz.— / per cent if in the United Kingdom not under average. / per cent under average, or if abroad. } and arrival.

[1] For the meaning of the words *port*, *harbour*, etc., in the return clause see Mr. Justice Bucknill in *Columbian*$_8$, 1901 (*Leyland* v. *B. & F. M. I. Co., Ltd.*).

The latter is the form adopted in the 1903 time clauses.

It is to be remarked regarding the cancelling return, that the clause in the policy does not constitute an agreement to cancel, it only determines the amount of return payable in case cancellation takes effect. In fact there is no reason for regarding policies of insurance as different from other documents of contract with respect to resiliation: without previous agreement to the contrary a contract can only be cancelled by mutual consent of the parties. It therefore appears to be impossible for either assured or underwriter to enforce the cancellation of a policy without consent of the other.[1]

Warranty of Seaworthiness.—In one respect time policies are strikingly diverse from voyage policies: the former are exempt from the warranty of seaworthiness to which the latter are always subject (see below, p. 272, Warranties).

[1] This appears to differ from what is laid down by Mr. Justice Charles in his decision of the *Abrotas* case (26th Jan. 1895, 11 Times L. R. 196) respecting the cancellation of a charter-party. In that case the voyage for which the vessel was chartered became, through stranding, impracticable in a commercial sense; and a loss would have fallen on the freight policy but for the words: "No claim from the cancelling of any charter . . . allowed." Mr. Justice Charles observed that it was "true that the word *cancellation* originally imported an act done, but it might mean that on the occurrence of certain facts the contract should be deemed to be cancelled or put an end to." But it is submitted that there is no state of facts, except mutual agreement of the parties, which can bring into play the cancelling return clause of a marine policy.

The decision of the Divisional Court was reversed on appeal (Ct. App. May 1895: 11 Times L. R., 416), Lord Esher, M.R., said: "As a general rule, neither of the two parties to a contract could by himself cancel the contract. It could only be cancelled by the mutual assent of both parties."

CHAPTER XV

LIABILITIES

It became apparent early in the history of seagoing commerce that the owners of ships might be liable for damage done by their vessels, or by persons in their employment, to goods carried on board these vessels, to other vessels, or to goods carried by them. The most obvious form of accident giving rise to liability of this kind is the collision of two vessels.

Collision Liabilities not covered by ordinary Lloyd's Policy.—As respects insurance of collision liabilities we do not find that any provision existed in England before 1836, when the case of *De Vaux* v. *Salvador*[1] came before Lord Denman in the Court of King's Bench. The ship *La Valeur* came into collision with a steamer in the Hugli River, considerable damage occurring to both vessels. The owner of *La Valeur* claimed compensation from the owners of the steamer; and the claim having been referred to arbitration, it was awarded that each vessel should pay half of the sum of the damage sustained by both vessels. Under this award the ship had a balance to pay to the steamer. The owner of *La Valeur* brought an action against his underwriter to recover the sum he had thus been compelled to pay: he claimed it as a particular average loss, alleging that it arose out of a peril of the sea. The Court held that he could not recover, the ground of this decision, as stated by Lord Denman, being that the obligation to pay the sum in question was neither "a necessary nor a proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations . . . not dictated by natural justice, nor possibly

[1] 4 A. & E. 420.

quite consistent with it."[1] It is worth remarking how near the commencement of the era of steam-shipping is the date of this decision regarding the indirect effects of the peril which has become almost the most frequent and disastrous in modern navigation. Similarly underwriters on an ordinary policy on ship have been held not liable for expenses incurred by the shipowner in disposing of a cargo damaged in a collision and rejected by the cargo owners as worthless.[2]

Running-down Clause.—As the shipowner had no protection from his ordinary policy in the matter of his collision liabilities, it became necessary to draw up a special contract to cover him. This contract is known as the collision clause, or as it is better named the running-down clause (R.D.C.). It is now extremely unusual to find a ship policy without some form of this contract either printed in it in the body of the text, or in the margin, or attached to the policy.

Extent of Shipowner's Liability.—By the Merchant Shipping Act of 1894 (57 & 58 Vict. c. 60), § 503,[3] the full amount for which a shipowner, British or foreign, is in our courts liable for loss of life or personal injury either alone or together with loss or damage to property—provided he is not by his own default or privity concerned in the same —is £15 per ton.[4] The liability under the latter head alone is £8 per ton. The tonnage on which this liability is calculated is in the case of sailing ships the net register tonnage, in the case of steamers the gross tonnage without deduction on account of engine-room space.

[1] It is striking that in the same year 1836, in the case of the ship *Paragon*, before the Supreme Court of Massachusetts (*Peters* v. *Warren Insurance Company*), Mr. Justice Story held that American law was of exactly the opposite effect. In a later case (*General Mutual Insurance Company* v. *Sherwood*) Mr. Justice Curtis adopted Lord Denman's view, so that now American and English jurisprudence agree on this matter. See Phillips, *Law of Insurance*, § 1137a.

[2] *Field S.S. Co.* v. *Burr*, 1899 (15 Times L.R. 193, Ct. Appeal).

[3] Reproducing the provisions of the Merchant Shipping Amendment Act of 1862 (25 & 26 Vict. cap. 63), § 54.

[4] For apportionment see the *Victoria* (Admiralty 3rd July 1881, Butt, J.), Aspinall M. L. Cases VI. N.S. p. 335: £7 a ton to be exclusively applied to life claims, and the balance of such claims and the cargo claims are to rank *pari passu* against the balance of £15 a ton.

Until within the last few years it was the universal practice of English underwriters to refuse to cover shipowners against any liability to third parties, except liability done to property by collision, and that only to the extent of three-quarters. All other liabilities were described (in what certainly seems to be an inconsequent phrase) as "not insurable" or "not covered by underwriters." It was explained that the shipowner was supposed to bear one-fourth of the collision liabilities and the whole of all other liabilities connected with his vessel. The practical result of these restrictions will appear in the course of examining the clauses generally adopted.

Various Forms of Running-down Clause.—In 1884 there were nine or ten distinct varieties of the running-down clause, in 1890 there were some fifteen or sixteen.[1] But in some points they all agree: as already explained, there is in all the customary clauses the limitation of the underwriter's liability to three-quarters of the shipowner's. But with modern steamers and ships of large tonnage the remaining quarter of this liability has been found to be so serious in amount that shipowners have formed mutual associations to take this risk among others. Thus, all the additional security which the original underwriter thought he had obtained for the reasonable and careful handling of the ship by refusing to cover the full collision liability has vanished. As has already been shown, something similar has happened in almost all cases where underwriters have restricted their liability to the assured. It appears, therefore, that adherence to this limited form of cover cannot now be justified on any ground of principle or commercial policy, but simply on custom. Similarly, the customary running-down clause expressly excludes from the liabilities of underwriters all liability for sums paid, or due to be paid for loss of life or personal injury. This stipulation, introduced originally for the convenience and safeguard of underwriters, has also acted as a lever to force shipowners to cover in mutual associations their liability to pay for life and limb. There is then left only material damage; and

[1] Owen's *Marine Insurance Notes and Clauses*, 3rd ed. 1890.

even in this limited sphere further limitations occur, the clause being usually worded so as to include only such damage as occurs in consequence of collision of the ship insured with "another ship or vessel." Even without that explicit wording there is authority for saying that in a policy of marine insurance the word "collision" means solely collision with another ship or vessel (per Lord Coleridge in *Richardson* v. *Burrows*, Q.B.D. 1880; see Lowndes, Law M. I. p. 199).[1] Consequently, damage done to a floating buoy, pontoon, or similar structure, does not fall within the scope of the clause now under discussion; much less does damage to stages or piers, floating or fixed, or to such works as jetties, breakwaters, quays, or dock-walls.

The clause in which the foregoing conditions were expressed ran as follows (Lloyd's Clauses, July 1883):—

R. D. C. And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of £8 per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of £8 per ton—or if the value hereby declared amounts to a larger sum, then to such declared value—and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourths of the costs thereby incurred or paid, provided also that this clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals for any cause whatsoever.

Addenda.

As this clause incorporates the English statutory limitation of liability, the protection it affords may not be sufficient to protect the shipowner to the extent of three-fourths of his liability in all cases. Most foreign countries have fixed the limit of liability of a vessel at her value; or put in another way, any claim of whatever magnitude for damage done by a vessel is legally satisfied by surrendering to the injured

[1] See p. 182, and Mr. Justice Bigham in *Chandler* v. *Blogg*, 14 Times L. R. 66.

Addenda.

party the ship which has done the damage. When an English vessel does damage in collision in waters not within the jurisdiction of our courts, that vessel cannot effectively claim the benefit of the law of her flag. It was to provide *full* cover to the extent of three-quarters that the foregoing clause was modified by the deletion of the words referring to £8 per ton. The serious decrease in the insured value of vessels occurring within the last two or three years has led to a revival of the use of the £8 a ton clause. When vessels are declared as worth sums varying from £4, 10s. to £7 per ton, it is natural that the underwriters, whose premium income depends on the amount insured, should object to give the cover granted in the unlimited form of clause. In many foreign jurisdictions it is extremely difficult to make sure that the value attributed to a vessel in a collision suit will be reasonable, especially if the vessel damaged in the collision is a native craft. The result of these considerations has been, as stated above, a revival of the £8 per ton clause.

The English limitation of liability to £8 per ton for destruction and damage of property alone, and to £15 per ton for destruction and damage of property and loss of life or personal injury, takes effect for each separate occasion on which the vessel becomes liable. That is to say, the limit is not applied to the sum of the liabilities incurred on any voyage or in any one year, but to the sum of the liabilities incurred in each separate collision for which the vessel in question is found to blame. Sometimes cases occur in which a vessel breaking away from control strikes one ship, glides off and runs into a second, and so on, the whole string of disasters arising from one original single fault. In such cases the courts have tempered the severity of the burden laid on the defaulting shipowner. In the case of the *Creadon* (Admiralty, 8th April 1885[1]) Mr. Justice Butt decided that where a vessel came into collision with two others, with but a brief interval between the accidents, the first of them being the efficient cause of the second, no second act of negligence on the part of the defaulting ship having come into play,

[1] Asp. Mar. L.C. 585.

the shipowner is entitled to make his limited liability cover his responsibility for both accidents. The ground given for this decision was that in the case in question the second accident was inevitable after the first occurred.[1]

Classes of Collisions.—It becomes important for the determination of the liability on a policy to determine the class to which any particular collision belongs. There are four classes of collisions :—

I. Neither vessel being in default, no negligence occurring, nobody to blame : *i.e.* inevitable accident, the result of circumstances over which no one has had control—*force majeure*, the act of God.

II. Neither vessel being distinguishable as in fault : *i.e.* inscrutable accident.

III. One of the vessels being in default : one ship solely to blame.

IV. Both of the vessels contributing by their default or negligence to the accident : both to blame.

I. Accidents of the first class are rare : perhaps the universal insurance of collision liabilities has contributed to produce this rarity. But they are easy to imagine : suppose a cyclone breaking over a river crowded with shipping, all properly moored and fast according to the requirements of good seamanship for the place. If in the course of such a tempest one vessel is, without any negligence on the part of her captain and crew, thrown against another and damage is done, there seems to be a fair case for considering the damage as due to inevitable accident. The mere fact of one vessel driving down on another or striking her is not sufficient to render the former liable for the damage done to the latter ; there must be some proof of negligence on the part of the former vessel to constitute liability on her part.[2]

[1] If such a case occurred in American waters, or in the waters of any Continental state, and if the damage done to the first vessel exceeded the value of the offending vessel, would the second ship have no recourse against any one for the damage sustained by her? The same question would arise in case of several separate collisions on one voyage.

[2] See Marsden's *Law of Collisions at Sea*, 3rd ed. p. 1.

II. In the second class, namely, in cases where the collision has manifestly resulted from fault somewhere, but the evidence tendered does not show to the satisfaction of the court where the fault lay, the English practice is that no damages can be recovered, each vessel bearing her own loss. The practice in other countries varies; for instance in America, according to some authorities, the loss in such a case is divided: in France the loss is equally divided. But it does not often happen that collisions can be classed as inscrutable accidents, and the tendency is more and more to regard cases of doubt as cases in which both are to blame.

III. Where one ship only is to blame, that ship has to bear the loss and damage inflicted on the other. If the owner of the defaulting vessel sees that the sum due by him exceeds the statutory liability of his vessel, he makes special application for the limitation of the claim against him to the amount of that statutory liability. For by the Act of Parliament already cited, the limitation takes effect only in cases where the loss or damage for which the shipowner is held liable has not resulted from his own fault or with his privity, so that the authorities must be satisfied on that point before they will grant the limitation.

In this case the application of the loss to the under writer who insures against three-quarters of collision liabilities is simple. If he has given the so called "unlimited" clause (*i.e.* containing no reference to £8 a ton), he pays the same proportion of three-fourths of the whole amount paid by the shipowner that his subscription bears to the value of the vessel stated in the policy. If he has given the £8 a ton clause, he pays the same proportion of three-fourths of the whole amount paid by the shipowner that his subscription bears to the value of the ship at £8 a ton, unless the value of the ship stated in the policy exceeds £8 a ton, in which case he pays the proportion that his subscription bears to that value. As the £8 a ton clause does not fully protect for three-quarters of collision damages any ship valued under £8 a ton, it becomes necessary for the shipowner, if he wishes to be fully

protected, to do an additional insurance against three-quarters of collision liabilities only for the difference between the policy valuation of his vessel and her value calculated at £8 a ton. For, as we have seen, in determining the shipowner's collision liability no reckoning is taken of the actual value of his vessel, whatever be her age or condition.

IV. The fourth and by far the most difficult case is where both vessels are to blame. In actual experience these cases are far from rare, they have given rise to much the greatest amount of dispute as regards the law of collision.

With respect to this class of collisions the English practice of determining the incidence and apportionment of damage differs from that of many other nations. The old Admiralty rule was that where both vessels were to blame, the damages sustained by both were to be added together and the sum halved, and each vessel had to pay one-half. If a case is worked out on this rule it will be found that there are two ways of arriving at the same result :—

(*a*) Each ship paying one-half of the total damages into a common fund, and then taking out the amount of the damages sustained by herself.

(*b*) The ship which has suffered less damage paying to the one which has suffered more the difference between the halves of their damages.

The first plan requires in all three payments, the second only one. The second became the customary practice of settlement in the Admiralty Court.

Abroad, the treatment of cases of both to blame is as follows : [1]—

United States of America	as in England.
France	according to the degree of each ship's fault.
Belgium	as in France.
Holland	each bears her own loss.
Germany	neither can recover.
Italy	each bears her own loss.
Spain	as in Italy.

[1] Condensed from Marsden's *Collisions at Sea*, 3rd ed. pp. 158-160.

Portugal	as in Italy.
Russia	(probably) loss rests where it falls.
Scandinavia	court decides in each case whether damages payable by the one to the other and their amount.
Egypt	loss made good by both vessels in proportion to their values.

It is evident from this statement that an agreement between the parties concerned in a collision to enter action in the courts of any particular country may enormously affect the amount of damages recoverable and payable. Where the vessels in collision belong to one nationality and the cargoes on board belong to persons of the same nationality, it is quite usual for them to agree to settle in accordance with their national law.

Single Liability and Cross Liability.—The practice of settling the damages springing out of a collision in which both vessels are to blame by making one payment, has resulted in the doctrine that the liability in such a case is not a *cross* liability of each ship to the other, but is a *single* liability of the less damaged to the more damaged ship. This distinction becomes extremely important when the damage done to both ships and cargoes exceeds £8 per ton of the offending vessels and suit for limitation of liability has been granted. Suppose two large steamers A. and B., each with a valuable cargo, get into collision, each contributing by negligence to the accident. Then the damages to property may easily exceed the statutory limit of £8 a ton, and the question arises whether in the case of each vessel the limit is to be applied to her half of the total damage, or the limit is to be applied, in the case of the less damaged vessel, to the difference between the halves of the respective damages of the two vessels. This point came up in the cases of *Chapman* v. *Royal Netherlands Steam Navigation Company*, 1879,[1] and of *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (*The Voorwaarts* and *The Khedive*).[2] The latter case went to the House of Lords in July 1882.

[1] L.R. 4 P.D. 157. [2] L.R. 7 App. Cas. 800.

It was decided that settlement between the shipowners was to be effected on the principle of single liability. Consequently, when the statutory limitation of liability is granted it is applied to the tonnage of the vessel which has a balance to pay; and this amount (*i.e.* the maximum statutory liability of the less injured vessel) is divided among the other claimants of damages in proportion to the damage they have suffered. This principle was applied to a policy of insurance in the case of the *Balnacraig*, (*London Steamship Owners' Mutual Insurance Association* v. *Grampian Steamship Company*, 1889 and 1890).[1]

In Appendices II. and III. of his admirable *Contract of Marine Insurance*, Mr. M'Arthur has made a special study of collision liabilities and of the effects of the different forms of the running-down clause. The only recent important variation of this clause is the provision contained in the Institute Clause, that when both vessels are to blame for a collision, and neither of them limits her liability, claims under the clause shall be settled on the principle of cross liabilities. It will be found on working out cases of this kind that the assured comes out of a cross liability settlement with results more favourable than a single liability settlement gives. The clause of the Institute of London Underwriters runs as follows:—

> And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured; and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principles of cross liabilities, as if the owners of each

[1] L.R. 24 Q.B.D. 32 & 663.

vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Ships of Same Owners in Collision.—All these arrangements and adjustments of liability apply only when the insured shipowner has become liable to pay and has paid to the other shipowner sums in respect of his responsibilities. The case is somewhat altered when the two ships belong to the same owner. There can be no liability on his part as the owner of the one to pay anything to himself as the owner of the other, he cannot sue himself (see pp. 169, 170). But he is liable to the cargo-owners of both vessels for damage suffered by them. As regards the hulls, although the owner may have insured them with entirely different underwriters, he cannot under the ordinary collision clause recover anything from either set of them in respect of collision liabilities. He consequently has himself to bear his collision damages, unless they exceed 3 per cent, and are claimable as the direct results of a sea peril. To avert difficulties of this kind the following clause, known as the *sister ship* or *same ownership clause*, is occasionally used :—

And it is further agreed that the principle involved in this clause shall apply to cases in which the vessels are the property in part or in whole of the same owners.

But the cases in which it has come into operation are most infrequent.

Vessels in Tow.—An extension has lately been given to the operation of the running-down clause by the decision in the case of the *Niobe* (*M'Cowan* v. *Baine*, 1891).[1] The *Niobe* was being towed by the *Flying Serpent* steam-tug, which ran into the *Valette*. In consequence of bad look-out on board the *Niobe* her helm was not ported till too late to avert the collision. Had she

[1] 7 Times L.R. 713 (House of Lords).

ported in time she would have so controlled the movements of the *Flying Serpent* that her course would have been forcibly altered, or she would at least have warned the *Flying Serpent* of her danger. The *Niobe* was held to blame for the collision, and the underwriters of the hull of the *Niobe* were held liable under the running-down clause attached to their policy for their proper proportion of the damages and expenses attaching to the *Valetta*, from the collision.

Generally the doctrine of tug and tow is that the tug is the servant of the tow, being there simply to supply the necessary motive power. But it would seem to be hardly equitable to make a towed vessel responsible for damage done in consequence of the fault of her tug unless she has some way contributed to it or failed to take the proper steps to prevent it.[1]

Items included in Collision Claims.—It is to be remarked that as the running-down clause is not part of the ordinary policy of marine insurance, but is a separate contract, it is not interpreted with the same strict reference to the doctrine of proximate cause as the policy is. In the running-down clause one is no longer dealing with a contract of indemnity for material damage immediately resulting from certain named perils, but with a guarantee of repayment of a stated proportion of liabilities involuntarily incurred by the assured. Nothing in the wording of the running-down clause excludes claims for loss of time, or loss through failure to meet engagements sustained by the unoffending vessel, and, in fact, it not unfrequently happens that these secondary results of the accident are as great in their amount as the cost of repairing the material damage inflicted in the collision.[2]

[1] Sir Barnes Peacock in *Smith* v. *St. Lawrence Towboat Company* (Privy Council, 57 C.P. 314), "It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug steamers is that the tug shall direct the course. The tug is the moving power, but it is under control of the master or pilot on board the ship in tow." Quoted by Barnes, J., in *Altair*, (Adm. 13 March 1897).

[2] *E.g.* Cost of dispersing wreck of unoffending vessel paid by offending vessel held to be liability of underwriters of offending vessel who insure collision liabilities. *Burger* v. *Indemnity Mutual*, 1899, per Mathew, J., in Q.B.D. 15 Times L.R. 506.

Four-fourths, R.D.C.—The running-down clause discussed above deals with only three-quarters of the shipowner's liabilities; in a few cases underwriters have consented to extend the provisions of the clause to cover the whole of the assured's liabilities arising out of damage done to property by collision of the insured ship with another ship or vessel. The clause thus extended is known as the four-fourths running-down clause.

Other Liabilities.—It has been already pointed out that in consequence of the restricted responsibility assumed by underwriters for collision and other liabilities, shipowners felt themselves compelled to resort to mutual associations for fuller protection. The position taken up by underwriters has been described as the result of lack of enterprise and initiative, in fact, of failure to appreciate the necessities of the shipowner's position. However this may be, it is worth recording that in 1886 three Liverpool Marine Insurance Companies—the British and Foreign, the Union, and the International—introduced what they called a full protection policy, which was in effect a Lloyd's policy on the hull of a vessel without the collision clause, but with clauses added dealing with *all* the important liabilities of the shipowner.[1] The part of this document dealing with liabilities commences as follows:—

> And so far as concerns the aforesaid insurance against liabilities the company promises and agrees as follows: that is to say, that the company will protect and indemnify the insured against any such liabilities incurred by him or them (without his or their actual fault or privity) at any time while the ship is insured by this policy as aforementioned, in respect of his or their ownership of or other interest in the insured ship, or in respect of any contract for the carriage of any goods or passengers in the insured ship, for any losses, claims, demands, damages, or expenses which may arise from or in consequence of

certain losses and damages which are detailed in six paragraphs following. The first two of these go to the root of collision liabilities with a directness that is quite refreshing after the tedious roundabouts of the running-down clause,

[1] The full text of this policy is given in Appendix F.

whether three-fourths or four-fourths, limited to £8 a ton or unlimited :—

(1) Any loss of life or injury to any person whomsoever or any life salvage.

(2) Any loss of or damage to any other ship or boat or any goods, merchandise, or other things whatsoever on board any other ship or boat.

The item of life salvage is one of importance, as the reward for the saving of life at sea forms the first lien on the ship and goods saved. In the case of passenger steamers the shipowner might have a large amount to pay for life salvage, without having any means of enforcing from any of the lives saved any contribution to the costs of their salvage.[1]

As was stated above, the dictum of Lord Coleridge in *Richardson* v. *Burrows*[2] restricts the meaning of "collision" in the running-down clause to collision with another ship or vessel. But it is notorious that harbour boards, pier-owners, telegraph cable companies, and the General Post Office (as the owner of British inland and cross-channel telegraphs) are entitled to make claims for damage done to their property: consequently, cover is granted in § 3 for

(3) Any damage done to any harbour, dock, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or moveable thing whatsoever, or to any goods or property being thereon.

These sections exhaust the liabilities of the shipowner for loss of or damage to things *outside* the ship. The policy then turns to what is carried *in* the ship :—

(4) Any loss or damage of or to any goods, merchandise, or other things whatsoever, whether on board the said ship or not, which may arise from any unauthorised deviation of the said ship, or from any improper navigation of that or any other ship or boat. But this is not to include any loss or damage which may arise proximately or otherwise from improper stowage, or by any emanation from or action of any part of the cargo or any previous cargo, or from any uncleanliness of the ship when loading, or from any want of proper ventilation.

[1] Life salvage not recoverable under Lloyd's policy, see *The Arno*, Ct. Appeal, 14th May 1896.

[2] See Lowndes, Law M. L. p. 199.

This clause practically grants to the shipowner indemnity as regards all claims brought by parties interested in cargo, whether already loaded or not, in consequence of the action of the shipmaster when beyond the owner's control. The clause is very wide-reaching; it is extremely hard to imagine what may not be included under the words "improper navigation of that or *any other ship or boat*." Probably the meaning would be made clearer by the addition of some such words as "in the course of the voyage insured." In connection with the words "improper navigation," it is right to remark that in the case of the *Warkworth* (Court of Appeal, June 1884, Esher, M.R., Bowen and Fry, L. JJ.) it was held that when a collision for which a vessel is held to blame is caused solely by a defect in her steam steering-gear, negligently repaired ashore by people employed by the shipowner, that constitutes "improper navigation" within the meaning of the Merchant Shipping Act.

In connection with paragraph 5, dealing with removal of wreck, there are three cases of interest:—

(*a*) In the case *Earl of Eglinton* v. *Norman* (Court of Appeal, April 1877)[1] it was held that when harbour officials, in pursuance of the provisions of the Harbour Acts of 1847, remove wreck which blocks the entrance or approach of a harbour, the "owner," who by the Act has to bear the expense of this, is the shipowner to whom the vessel belonged when she was wrecked, and not the underwriter on the ordinary marine policy who has paid a total loss and claimed the salvage. This decision has been in part overruled by the decision of the House of Lords in *The Crystal* (*Arrow Shipping Co.* v. *Tyne Commissioners* June 1894: 10 Times L.R. 551), but in that decision the Lord Chancellor (Herschell) said: "It is unnecessary to determine whether the underwriters are to be treated as the owners within the meaning of the statute."[2]

(*b*) In *Castellain* v. *Thompson* (Common Bench,

[1] 3 Asp. Mar. L.C. 471. [2] 7 L.T. N.S. 424.

November 1862)[1] it was held that when a flat-owner raised his sunken flat and her cargo without getting the cargo-owner's consent or approval of the incurring of the expenses necessarily involved, he was bound to deliver the cargo in return for the agreed freight and without any lien for share of expenses.

(*c*) In a somewhat similar case, *Prehn* v. *Bailey* (Court of Appeal, 20th July 1881, Jessel, M.R.),[2] it was held that when the Thames Conservancy lifted a vessel and cargo, sunk in collision by the vessel's own fault, and delivered them to the shipowner on payment of the cost of raising, the shipowner (having limited his liability) had no lien on the cargo and no claim on it for a share of the expenses.

The hardship of the position of the shipowner in the three cases cited is justification enough for any attempts on the part of underwriters to protect him from such liabilities as those described. In paragraph 5 we consequently find—

(5) Any attempted or actual raising, removal, or destruction of the wreck of the said ship or the cargo thereof, or any neglect or failure to raise, remove, or destroy the same, but deducting the value of any salvage, wreck, or cargo which may be recovered by the insured, or which may be available for or chargeable with such claims or expenses.

Having exhausted the liabilities the policy proceeds to deal in paragraph 6 with—

(6) The costs and expenses incurred by the insured in resisting any claims covered by this policy, or in any legal proceedings in relation to any such claims, provided such costs or expenses shall have been incurred with the consent in writing of the company.

Thereafter special provision is made for excluding all claims below £10, except claims for costs; and excluding

[1] See *Barraclough* v. *Brown*, 1896, 12 Times L.R. 250, *J. M. Lennard* (House of Lords, 19 July 1897); and *Burger* v. *Indemnity*, 1899, 15 Times L.R. 506. [2] 6 P.D. 127.

absolutely all claims arising from improper stowage, the latter no doubt on the ground that the stowage is entirely within the control of the shipowner or his agents.

Next follows a section obliging the assured to limit his liability where he can legally do so, under penalty of the company being free to refuse him any indemnity beyond that to which he would have been entitled had he so limited his liability.

Thereafter comes the important clause :—

> In no case shall the aggregate amount of the indemnity to be made or contributed to by the company in respect of any one occasion exceed in all (including interests and costs) £30 per ton on the gross tonnage of the insured ship.

These are the sole limitations to the scope of the protection afforded by the special policy in question. The document is, as far as the insurance of liabilities goes, simple and to all appearance adequate. It is at least an attempt on the part of professional underwriters to give to the shipowners an insurance of their tonnage both against the perils it may be exposed to and the liabilities it may incur, and to give this in one document combining the traditional form of Lloyd's policy and a form designed to meet the reasonable wants of protection with respect to liabilities which are extremely serious and press on shipowners with unmistakable weight.

CHAPTER XVI

WARRANTIES AND REPRESENTATIONS

In the language of marine insurance the word "warranty" is used to denote two entirely different things :[1]—

A. It sometimes denotes "stipulations . . . which are exceptions to the general terms of the contract, by which the underwriter is to be exempted from certain risks, either wholly or in part" (Marshall, p. 353, note *a*). For instance, it is not unusual to hear the F.P.A. clause described as the F.P.A. "warranty," the F.C. and S. clause as the F.C. and S. "warranty," and sometimes the memorandum is called absolutely "the warranty." The reason is plain ; as these clauses run in the form "warranted free from," etc., it is not unnatural that they should be called "warranties." It is also not impossible that this use of the word was encouraged by underwriters, for, as will be found later, the effect of a "warranty" in the sense about to be explained is very stringent, and the application of this word to denote an exception or exemption from the general terms of the contract may have been intended as a sign of the strictness with which that exception or exemption would be interpreted by the underwriter in his own favour.

B. In the stricter sense a warranty in a contract of marine insurance is :—

[1] *Cf.* Arthur Cohen in *Law Quarterly Review*, April 1895, "A warranty is a *condition* rendering the contract voidable in case of non-compliance, and not a stipulation for breach of which action lies. It is this essential distinction between a condition and a stipulation that Mr. Arnould and Mr. Phillips have overlooked."

I. "A stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the contract depends" (Arnould, p. 625). Or

II. A fundamental essential factor or condition inherent in each and every contract of marine insurance without exception.

The former class of warranties being stipulations set forth on the policy are called *express* (or *expressed*) *warranties*. The latter being essential to the whole universe of marine insurance do not require any form of expression, appear in no policy or other document, but remain immanent and are of absolutely controlling effect: they are therefore termed *implied warranties*.[1]

I. **Express Warranties.**—No covenant can amount to an express warranty unless it appear written (or printed) on the *face* of the policy. In *Pawson* v. *Barnevelt*, 1779,[2] the case turned upon the importance to be attached to a written paper of instructions, stating that the vessel insured "mounted twelve guns and twenty men," wrapped up with and enclosed in the policy when it was brought to the underwriters for signature. Lord Mansfield said it was a mere question of law, and without hearing the evidence of the defendants' witnesses (who were ready to state that a written memorandum enclosed was always considered as part of the policy), "decided that a written paper did not become a strict warranty by being folded up in the policy" (Park, p. 479). The same eminent judge ruled in *Bize* v. *Fletcher*, 1779,[2] that the contents of a slip of paper wafered

[1] It should be observed that the word "warranty" has in marine insurance a sense quite different from what it has in the general English law of contract, in which it is used to denote an independent subsidiary contract, breach of which does not entitle the offended party to avoid or rescind the contract, but only to take action for breach or for set-off. The covenant in contracts other than those of marine insurance, corresponding to a warranty as described above, is termed a "condition." In *Hibbert* v. *Pigon*, 1783, Lord Mansfield said, "The warranty in a contract of insurance is a condition or a contingency, and unless that be performed there is no contract" (Marshall, p. 375).

[2] 1 Dougl. 12, note 4.

to the policy did not amount to a warranty. But any explicit reference on the face of the policy to any special rules or conditions is treated as amounting to a warranty, these rules or conditions being, although extrinsic to the policy, regarded as incorporated in the contract (*Routledge* v. *Burrell*, 1789[1]; *Pettigrew* v. *Pringle*, 1832).[2] So long as the covenant appears on the face of the policy it may be written either in the *body* of the policy or in the *margin* (*Bean* v. *Stupart*, 1778),[3] or at the *foot* (*Blackhurst* v. *Cockell*, 1789),[4] or written *transversely* in the margin (*Kenyon* v. *Berthon*, 1778).[5] As Lord Mansfield said in the case last cited, "As to its being only in the margin that makes no difference; it is all part of the contract when it is once signed." The only thing necessary is, therefore, that it be on the face of the policy when it is signed.

The cases and decisions reported on express warranties date mainly from the period of the great wars of the end of the eighteenth century and beginning of the nineteenth. They are, consequently, chiefly concerning warranties of nationality, armament, equipment, sailing date, and convoy; these were points of such special importance to the underwriters of that period that they expressly embodied them in their form of contract with the assured.

No special form of words is essential to the validity of a warranty, the word "warranted" need not appear; *e.g.* in *Kenyon* v. *Berthon*, 1778,[5] the words were, "In port 20th July 1776." One single word may be sufficient, *e.g.* the *Mount Vernon*, an "American" ship (*Baring* v. *Claggett*, 1802),[6] was so described in a policy on goods carried by her, and this description was held to be equivalent to an express warranty that she was an American. The nationality of the carrying ship as described by that one word attested her neutrality, and so affected the safety of the goods loaded in her as regarded capture, seizure, or detention by enemies.

[1] 1 H. Bl. 255.
[2] 3 B. & Ad. 514.
[3] 1 Dougl. 11.
[4] 3 T. R. 363.
[5] 1 Dougl. 12, n.
[6] 3 B. & P. 201.

Warranties of nationality in time of war are of great importance, not only as stipulating the flag of the vessel, but as involving also the proper documenting of her in the way required by the laws of her country and the treaties of her Government with that of the country of destination (*Baring* v. *Claggett*, 1802).[1]

Similarly with warranties of armament and equipment. They indicate the capacity of a vessel to beat off enemies, and to have, even after hostile encounters, sufficient navigating power to complete the voyage.

As to convoys, the safety of any venture in time of war is so evidently affected by the presence or absence of a friendly armed convoy, that the risk would be to the underwriter of an entirely different character were the undertaking to sail under convoy not literally fulfilled.

Penalty for Breach.—In these cases it is evident that there is no hardship to the assured in demanding the exact fulfilment of the very words of the warranties; to pass any less strict application of them as permissible would be to deprive the warranties of the most of their value. To prevent any misuse of warranties the penalty attaching to their non-fulfilment has been made severe; if the statement is false or the promise broken, the party to whom it is made is entitled to rescind the contract, and is discharged and exonerated.

Interpretation of Warranties.—The words of a warranty are always to be taken in their commercial sense. Within that sense they are to be strictly and literally taken. In *Bean* v. *Stupart*, 1778,[2] the warranty read, "Thirty seamen besides passengers;" only twenty-six men signed on as mariners, but there were some boys on board, besides cook, steward, and surgeon. It was held, after hearing evidence, that this crew fulfilled the requirements of the warranty, which meant merely "thirty persons engaged in navigating the ship besides passengers." In *De Hahn* v. *Hartley*, 1786,[3] action was taken upon a policy insuring goods, per *Juno*, at and from Africa to the West

[1] 3 B. & P. 201. [2] 1 Dougl. 11. [3] 1 T.R. 343.

Indies, containing the warranty, "Sailed from Liverpool with . . . fifty hands or upwards." The policy was held void because the *Juno* sailed from Liverpool with only forty-six hands, arriving in Beaumaris six hours later, and proceeding thence with fifty-two hands on board. It was in his judgment on this case that Lord Mansfield remarked: "A warranty must be strictly complied with." On the other hand, a warranty cannot be extended by inference beyond what is necessarily contained in it. The case of *Hyde* v. *Bruce*, 1783,[1] turned upon a warranty that a ship should have twenty guns; she had in fact twenty-two guns, but only twenty-five men, far too small a crew to handle the guns. But Lord Mansfield held that the warranty had been fulfilled. "If a warranty be meant to mislead, it is a fraud as much as a false representation. In this case there is no ground to impute fraud, and therefore the plaintiff is entitled to recover." No reconciliation of these judgments is possible except on the ground of literal interpretation of the commercial sense of the words expressed in the warranty, and no more.

Sailing Warranties.—The same principle explains what would otherwise be a strange diversity in the sailing warranties of the period named. It was decided in *Bond* v. *Nutt*, 1777,[2] that a warranty to sail by a named date is fulfilled by the vessel merely starting on her voyage by that date, even though she proceeds only within the limits of her port of loading, provided she is and remains in every point ready and able to proceed further without delay. But if the warranty runs, "to sail *from*" a named port by a named day, the meaning is (according to Lord Ellenborough in *Moir* v. *Royal Exchange Assurance*, 1814)[3] that she should be out of the named port by that day.

Modern Warranties.—The warranties which are most in use nowadays are, in the case of certain voyages, *e.g.* to or from the Baltic, warranties of date of sailing (*e.g.* warranted sailing on or before 30th September); to San Francisco or the Far East, warranties as to the cargo of the vessel

[1] 3 Dougl. 213. [2] 2 Cowp. 601. [3] 4 Camp. 84.

(*e.g.* no coal, scrap iron or steel, or combustible or injurious chemicals; or, warranted laden under the inspection of the grain or petroleum stowage inspector at port of loading). Again, the warranty may be one of some course not to be taken by the vessel (*e.g.* warranted not to attempt the passage of Torres Straits, briefly "no Torres"). These are the customary sailing ship warranties of the day. For steamers insured on time, provision has to be made by underwriters dealing in one form with all the undesirable voyages that a vessel of the kind may undertake within a year. The following standard of warranty-requirement for ordinary steamers has been adopted by Liverpool underwriters, and formally declared to be the condition on which all their quotations are made in the absence of express understanding to the contrary :—

LIVERPOOL SLIP WARRANTIES

(1) Warranted not to enter or sail from any port in British North America.

(2) Warranted not to be in the Baltic or White Sea between 1st October and 31st March, both days inclusive.

(3) Warranted not to sail with over-net register tonnage of grain from any port in North America between 1st October and 31st March, both days inclusive.

(4) Warranted not to sail with over-net register tonnage of ore, iron, or phosphate, to or from any port in North America between 1st September and 31st March, both days inclusive.

(5) Warranted no east of Singapore (Java, Bangkok, and Saïgon excepted).

(6) Warranted no Bilbao.

(7) Warranted no Straits of Magellan.

All these conditions must be literally complied with, and in case of breach the policy becomes void from the moment of breach. To avert what might be the serious consequences to an owner of the unauthorised breach of warranty by a master, many shipowners word their deviation clause to cover also breach of warranty, *i.e.* of express warranty. The following form is that adopted in the Institute clauses :—

Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any

additional premium required be agreed immediately after receipt of advices.

Representations. — In consequence of the strictness with which warranties are interpreted and the severity with which non-compliance is punished, the assured and his representatives are most careful not to give a warranty unless they are positively certain that it will not be infringed. This is specially the case when the provisions contained in the warranty refer to matters over which the assured has not himself absolute control. A shipowner may have chartered his ship to people who, he is confident, will not load in her such cargo as dangerous chemicals, but unless he has made provision in the charter-party to that effect it would not be safe for him to accept in his policy a warranty of no dangerous chemicals on board. He may even have arranged informally that there be no loading of such cargo, and yet, having made no contract with the charterer to that effect, he finds it impossible (with due regard to the validity of his insurances) to accept the warranty. All he can safely do is to inform his underwriter how the matter stands ; he makes a *representation*, a less formal and less binding statement, whose incorrectness brings upon him less serious penalties.

Penalty for Incorrect Representation.—In the contract of marine insurance, as in other contracts of the fullest good faith (*uberrimæ fidei*), the incorrectness or nonfulfilment of a representation renders the contract voidable at the option of the other party, even though the subject of the representation does not affect the matter of the contract.[1] The penalty is thus only slightly less severe than that for breach of warranty.

Fulfilment of Representation.—It is in what constitutes fulfilment that the main and distinctive difference between warranty and representation lies. For the former one must have absolute and literal compliance, for the latter substantial compliance suffices. The distinction is clearly laid down by Lord Mansfield in *De Hahn* v. *Hartley*,

[1] T.R. 343.

1786,[1] "A representation may be equitably and substantially answered, but a warranty must be strictly complied with." This difference in the matter of fulfilment indicates that the transition between warranty and representation is a drop from a higher to a lower level: we have no longer to deal with a condition written on the face of a policy to be carried out literally and absolutely, but with a communication conveyed either by word of mouth or by writing not appearing on the face of a policy, but folded, pinned, wafered, or otherwise attached to it, and demanding only substantial fulfilment. Thus, in *Pawson* v. *Watson*, 1778,[2] a written paper wrapped up with and enclosed in a policy when tendered to the underwriters for signature was held not to be a warranty, but only a representation. Consequently the statement it contained, that the ship "mounts twelve guns and twenty men" was held to be fulfilled by her taking an equivalent number of guns and swivels and a crew of men and boys equivalent to the twenty men specified in the representation. There is thus a latitude of interpretation, an admission of equitable fulfilment of the statement which is absolutely foreign to the nature of a warranty.

Classes of Representations.—Representations may be of different weight: their importance differs according to the source whence they come. It would evidently not be fair to attribute to a statement made by a cargo-shipper regarding the position of a vessel, or the expected date of her sailing, the same importance as would properly attach to a similar statement made by the shipowner or charterer in whose control the ship was (*e.g. Bowden* v. *Vaughan*, 1809).[3] Apart from this consideration, it is evident that the mode of expressing a representation may have a great influence in determining the amount of importance due to it. A merchant or broker offering an insurance may be able to make certain statements of fact which he has derived from the best informed sources: he may be able

[1] 1 T.R. 343.

[2] 2 Cowp. 785.

[3] 10 East 415.

to state definitely whether a vessel has sailed or not, or when she sailed or is to sail. Or he may only be able to say that the vessel is expected to sail, or reported to have sailed, or to be about to sail, or that his opinion or some one else's opinion is that she has sailed or will sail about certain named dates. Representations thus fall into three classes :—

(*a*) Representations of fact.[1]

(*b*) ,, ,, expectation. { α of the assured (principal or agent). β of some third party.

It is evident that class (*b*) is of decidedly less weight than class (*a*), and that of class (*b*) the subdivision β is of much slenderer fibre than the subdivision α. It would be ridiculous to deal with a second hand report of some one else's opinion as of equal import to a contract with one's own allegation of fact. Cases have arisen in which the courts have attached no penalty to the nonfulfilment of representations material to the risk, but still merely expressions of probable expectations, and made *bonâ fide* (*Barber* v. *Fletcher*, 1779,[2] and *Bowden* v. *Vaughan*, 1809).[3]

The important matter to be determined in connection with representation is whether it is *material* or not; in other words, whether or not the representation has been of such a character that it can reasonably be considered to have influenced the underwriter to accept the risk, or to accept it at a reduced premium. If so the representation is material. The incorrectness of a material representation constitutes one of the causes which vitiate an insurance, and is known as *misrepresentation*. The failure to proffer a representation material to a risk submitted to an underwriter constitutes another of the causes which vitiate an

[1] Sometimes termed *positive* representations, and subdivided into *affirmative*, dealing with things as they are at the moment the representation is made, and *promissory*, referring to things as they will be at a later time. But a representation may be of a negative content; so that, apparently, this class would be better described as *absolute*, and subdivided into *actual* (or *present*) and *future*.

[2] 1 Dougl. 306. [3] 10 East 415.

insurance, and is known as *concealment*. These two subjects will be treated later (pp. 274-278).

II. **Implied Warranties.**—Having discussed express warranties and representations, both of which classes of statements refer only to the particular policy in which they appear, or respecting which they are made, we now pass to the implied warranties which form the necessary substratum of every English contract of marine insurance.

There are three great conditions which English law insists on finding present in every marine venture before it will enforce insurances made :—

(*a*) That the venture insured be carried out without deviation.

(*b*) That the traffic in which the venture is made be not illegal.

(*c*) That the vessel in which the venture is made be seaworthy.

(*a*) The subject of deviation having been already discussed in the examination of the text of the policy (pp. 61 to 63) need not be considered again here.

(*b*) Legality of trade. If the trade in which a venture is made is illegal the law does not protect the merchant or shipowner against third parties. It would be inconsistent with this principle if the law were to enforce claims made on underwriters for loss or damage occurring in the course of such trade. In *Redmond* v. *Smith*, 1844,[1] Chief Justice Tindal said: "A policy on an illegal voyage cannot be enforced, for it would be singular if the original contract being invalid, and therefore incapable to be enforced, a collateral contract founded upon it could be enforced."

But as a slight obliquity of vision or a temporary blindness of Justice, "as she is in England," prevents her from regarding as illegal any breach of foreign revenue laws by English subjects, foreign smuggling is not in English law illegal trading. In *Planché* v. *Fletcher*, 1779,[2] Lord Mansfield said: "At any rate this was no fraud in this country. One nation does not take notice of the

[1] 7 M. & Gr. 457. [2] 1 Dougl. 251.

revenue laws of another." Similarly, blockade running is not illegal in this country so long as the United Kingdom is a neutral; and ventures engaged in such traffic in these circumstances can be insured here with perfect legality. (Ex parte *Chevasse* in re *Glazebrooke*, 1865, before Lord Westbury).[1] The same holds of carrying contraband of war.[2] Under the Laws of War, vessels and cargoes attempting to run blockade or contraband of war being conveyed to alien enemies are liable to confiscation, but insurance to cover these eventualities is quite legal.

On the other hand, so soon as the United Kingdom is at war every traffic with the enemy is illegal, and consequently no insurance of any venture connected with such traffic is enforceable at law. It is clear that this provision proceeds entirely from considerations of public policy, as it does not refer to any particular trade or to contraband. Similar considerations have led to the regulation that insurances of enemy's property against capture by British ships are not recoverable (*Furtado* v. *Rogers*, 1802).[3]

(*c*) Seaworthiness. As was mentioned above (pp. 46, 47), this condition is slightly indicated in the customary forms of charter-party and policy of insurance by the use of the quaint phrase, "the good ship or vessel." What is meant by the warranty of seaworthiness of a vessel in connection with any marine venture in which she is engaged, is that in case of an insurance by voyage the assured guarantees that, for the voyage named in the policy—

[1] 34 L.J. (Bkpcy) 17.

[2] "At no time has opinion been unanimous as to what articles ought to be ranked as being of this nature, and no distinct and binding usage has hitherto been formed, except with regard to a very restricted class" (Hall, *International Law*, 4th edition, 1895, p. 665). Parsons has been cited as giving in his work on Maritime Law the following definition of contraband trade as in his judgment settled by the practice of maritime nations, viz., "Trade with a belligerent intended to provide him with military supplies, equipments, instruments, or arms. Goods are contraband which are in fact munitions of war, or certainly may become so, or which are designed or capable of being used for the support or assistance of an enemy in carrying on war offensively or defensively."

[3] 3 B. & P. 191.

(1) The vessel's fabric is fit as far as a vessel of the kind can be,

(2) Her gear is sufficient in quantity and quality,

(3) She is competently commanded and officered and fully manned,

(4) She is properly provisioned,

(5) She is not overloaded,

(6) If a steamer, she is adequately supplied with coal. Addenda. As all these requirements are stated in strict connection with a named voyage, it is evident that there is no absolute standard of seaworthiness. A steamer may be adequate to a voyage to the Far East which would not be fit to face the North Atlantic in winter; a sailer may be equal to work in the Mediterranean, but short of the standard required for the Baltic or North Sea trade. This has long been recognised by the English courts, so much so that in the case of *Thompson* v. *Hopper*, 1856,[1] it was laid down by Addenda. Mr. Justice Willes, that in the case of river steamers sold from Lyons to owners on the Danube these vessels in descending the Rhone must be seaworthy for the Rhone, and from Marseilles to Galatz they must be ready for the sea. Put generally, that is to say, that where a voyage consists of various parts of different degrees of peril, the warranty of seaworthiness will have been fulfilled if at the commencement of each new degree of peril the vessel is made adequate thereto. For example, in a combined risk on dock, river, lake, and ocean, it will be sufficient if at the commencement of each successive stage of the voyage the vessel is in such condition, in all the respects above named, as renders her adequate for the stage then commencing. If the vessel at the commencement of any one stage be unseaworthy for that stage the policy is thereafter void, and no loss thereafter can be recovered, even though the defect may have been remedied before loss, and the loss may not have proceeded from it (*Quebec Marine Insurance Company* v. *Commercial Bank of Canada*, 1870, quoted in M'Arthur's Contract of M. I. p. 17).[2] The implied warranty

[1] 26 L.J. (Q.B.) 18; 6 E. & B. 172, 937.
[2] L.R. 3 P.C. 234.

of seaworthiness having been broken, the insurance is void *ab initio*.

Seaworthiness as respects Time Policies.—The only policies not subject to the warranty of seaworthiness are time policies (*Gibson* v. *Small*, House of Lords, 1854).[1] The reason alleged for this unique exception is that there is nothing to prevent a time policy lapsing and a new one beginning[2] when the vessel is at sea, beyond the knowledge and control of her owner or manager as respects seaworthiness: that consequently insistence on the warranty in such a case might become inequitable. No doubt there is much to be said in favour of this contention, but it appears almost equally inequitable that after a vessel has returned to the control of her owner or manager, or of those who are in other respects acting as his agents in her management, the underwriter should still remain deprived of the protection which he would enjoy if the vessel were insured voyage by voyage. In view of this a clause has been drawn which seems to protect both parties to the insurance equitably:—

> This policy shall be subject to the same warranties of seaworthiness as if the vessel were insured separately for each voyage.

By this the owner of a vessel which has commenced in seaworthy condition the voyage on which his old policy lapses and the new one begins, is effectually protected to the end of that voyage, and the underwriter is assured of the proper information and control of the owner or manager at the close of that voyage.

Causes vitiating Insurance.—From what precedes it is evident that as the three essentials of a valid insurance are:—

(1) Completion of the vessel's passage (*iter navis*),[3] in the voyage insured (*viaggium*[3]). *i.e.* the prescribed customary course of navigation,

[1] 4 H.L. Cas. 353.

[2] Not "attaching," for that implies seaworthiness, the matter in uncertainty.

[3] See p. 37.

(2) Legality of the traffic in which the voyage is made for the venture concerned,

(3) Seaworthiness of the carrying vessel;

then three of the causes which vitiate a policy must be:—

(1) Deviation.

(2) Illegality of trade.

(3) Unseaworthiness of the vessel.

(1) With regard to deviation (pp. 61-63) there is not usually much difficulty nowadays in making sure of the facts. It is certainly much easier to trace the movements of a vessel than it was thirty years ago.

(2) Illegality of trade is also a matter more easily dealt with than in the time of the last sea wars in which England was involved. Thanks to regular postal communication and the development of submarine and overland telegraphs, the news of political complication is now so quickly diffused that there cannot now be that doubt of the intentions of an owner on any venture that may occasionally have arisen before these facilities existed.

(3) Unseaworthiness, however, has certainly become more difficult to establish, and probably this difficulty will increase from year to year. The burden of proof lies on the underwriter; the presumption of English law is that every vessel is held to be seaworthy until the contrary is proved.[1] The difficulty involved will become apparent if one considers the alteration in the position of the shipping trade, and consequently of the shipowner, in the last hundred years. At the commencement of that period there was no fixed minimum requirement of strength of materials or of equipment determined by Government officials, and classi-

[1] But in some cases (*e.g.* vessel foundering shortly after sailing without any apparent cause sufficient to account for it) where the fair presumption from the facts is that the disaster arose from causes existing at the time of sailing, it falls upon the assured to rebut the inference of unseaworthiness, *i.e.* he has to assume the burden of establishing seaworthiness. See Parsons, i. 379; Maclachlan's *Arnould*, 6th ed., ii. 678, citing *Davison* v. *Burnand*, 1868, L.R. 4 C.P. 117. The great leading case on seaworthiness is *Mills* v. *Roebuck*, Exchequer, 1769; Park, p. 335: see also *Eden* v. *Parkinson* and *Munro* v. *Vandam* (both *apud* Park, p. 333).

fying registries were still in their infancy. Consequently seaworthiness had then to be determined by the best information obtainable as to the requirements of a vessel for the one particular voyage in view. But all that has been altered in consequence of the supervision now exercised by the Board of Trade, and of the requirements of the registries as to the vessels classed by them. In fact the standard of minimum requirements of material, workmanship, and equipment having been fixed for the shipowner by recognised authorities whom he is either absolutely or practically compelled to obey or to follow, it has become a matter of extreme difficulty in any but the most extraordinary and flagrant cases to make good any allegation or suspicion of unseaworthiness. The same holds good of the arrangements made by the Board of Trade for the command and officering of ships; as regards sufficiency of crew the recent appointment of a Departmental Committee of the Board to investigate the question of manning, indicates a tendency to regard that matter as one that may in time fall within the Board's administration.

Breach of express warranty is also a cause which vitiates an insurance, unless, as was already remarked, provision is made in the policy to cover the vessel, in case such breach occurs, at a premium either stipulated in the policy or stated to be left for future arrangement.

There still remain representations to be dealt with as affecting the validity of a policy. What if the person offering the risk makes an incorrect statement, a false representation? What if he or the underwriter abstains from conveying information in his possession, the absence of which makes an appreciable difference in the nature of the risk offered? In other words, what if he makes a misrepresentation or a concealment of material facts or intentions? To take these two subjects in their order :—

(1) Misrepresentation is defined by Phillips, § 529, as "a false representation of a material fact, by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on terms less favourable to himself, when he otherwise might not do so, or might

demand terms more favourable to himself." This definition is almost the exact obverse of the words used above (p. 268) in trying to form a test to discover whether a representation is material or not. This would almost lead to the conclusion that all misrepresentation is material. In the discussion of this subject, Lowndes (Law M. I. p. 85), after approving Arnould's view (p. 551) that misrepresentation fraudulently made should vitiate a policy even though it be not material, goes on most admirably to say: "It may be doubted whether such a case ever arises in practice, for who would attempt to deceive by stating something not material to the risk? What is intended is, perhaps, merely this, that if a fraudulent design can be proved, the materiality of the misstatement need not be discussed." In law, whether a particular representation be material or not is in each case a question of fact.

The subject of misrepresentation has been discussed at great length and with great learning by many writers: by none more exhaustively and learnedly than Judge Duer in his *Lecture on the Law of Representations* (New York, 1844), afterwards incorporated in his monumental work on *Marine Insurance* (2 vols., New York, 1845–6). The difficulty felt by the lawyers has been to decide whether the effect of misrepresentation should be stated as proceeding from the presence of fraud in the statement made, or from something in the nature of the contract of insurance which is subverted or violated by the mere misrepresenting of any matter connected with it. This is hardly the place to attempt any examination of this difficult point of legal theory. But it is of importance to see how the matter looks in practice. When a merchant, shipowner, or broker offers a risk for insurance, his object, shown by the very fact of his making the offer, is to transfer from himself to the underwriter, in return for a premium to be paid and received, the risk in question. In making the offer he gives certain details, which may be classed under three categories—the unfavourable, the customary, the favourable. The unfavourable, as will be found in the next paragraph, he is bound to disclose; the customary he is entitled

to pass over, as the underwriter is considered bound to know them; only the favourable remain. An underwriter is therefore entitled to assume that a would-be assured tells him the unfavourable facts because he dare not conceal them without imperilling his insurance, passes over the customary because he need not detail them, and expounds the favourable because he desires to do so. If that is true of the information volunteered by the intending assured, it is doubly true of the content of replies made by him to questions put by the underwriter. The mere fact that questions are put on any special point must indicate that that point is one which the underwriter, rightly or wrongly, considers of some importance in regard to the risk. The questions may appear frivolous, so might the conclusions drawn by the underwriter appear if he were confident enough or careless enough to express them. Indeed from one single representation made in identical terms to two underwriters they may form entirely different opinions regarding a risk. But to each of them the representation may have been of actual weight in inducing him to arrive at his particular conclusion. It seems, therefore, enough for general practical purposes to say that (so long as it is borne in mind that a representation is fulfilled by substantial compliance) misrepresentation occurs in any information volunteered or given in reply to inquiry, whenever any statement made is not substantially correct, provided it might fairly be held to affect an underwriter's opinion of a risk or of the proper premium for it. A man is entitled to say he has no information if he really has none: it will then be open to the other side to ask him to get the information required; but a man is not entitled to invent information if he has it not, or to colour, improve, or adorn what he has. He may, however, before conclusion of the insurance withdraw or correct any representation he has made.

(2) Concealment. The intending assured is fully entitled to say he has no information if he really has none; but the case is altered if he has it and is not willing to communicate it voluntarily or in reply to the underwriter's

questions. What then? He is not permitted to "disremember," he is not entitled to remember to forget any material fact, he is under the necessity of disclosing it. But in this prohibition of suppression of material facts the obligation is mutual; it is as binding on the underwriter as on the assured. There must be no concealment or nondisclosure of any material fact lying exclusively within the knowledge of either party.[1] The penalty for such concealment is, that the contract is thereby made voidable within reasonable time at the option of the party against whom the concealment was made (*Morrison* v. *Universal Marine*, 1872–3).[2] The mutuality of the obligation to disclose was most weightily laid down by Lord Mansfield in *Carter* v. *Boehm*, 1776.[3] Good faith is the foundation on which he built up that judgment: he stated a long list of things which the intending assured need not communicate, —"what the underwriter knows, what way soever he came by that knowledge; or what he ought to know; or takes upon himself the knowledge of; or waives being informed of, or what lessens the risk agreed and understood to be run. . . . The rule is adapted to facts which are privately known to one party and which the other is ignorant of, or has no reason to suspect."

The same difficulty arises over the materiality or immateriality of a concealment which was found to prevail with respect to representation. In law, the question whether any one undisclosed circumstance be material or not is in each case a matter of fact. But there is this special point of difference between misrepresentation and concealment: misrepresentation, being conveyed in an actual statement, may be of various shades, tints, or grades of intensity as well as of various degrees of blame; concealment being merely negative, a simple failure to inform, is of only one degree of intensity, though it may be of various degrees of blame. Consequently it is much easier to conceive the misrepresentation of an immaterial fact than its concealment.

[1] The parties to the insurance must be *ad idem*. Mathew, J. in *Laing* v. *Union Marine*, 11 Times L.R. 359. Addenda.

[2] L.R. 8 Ex. 40.

[3] 3 Burr. 1905.

There is an interesting pair of cases arising out of one risk respecting concealment as it affects insurances done through brokers, *Blackburn* v. *Vigors*, 1887,[1] and *Blackburn* v. *Haslam*, 1888.[2] In the former the plaintiff instructed an insurance broker to effect on his account a reinsurance on an overdue ship. Whilst the broker was trying to place the risk he came across information tending to show that the vessel was wrecked. He did not communicate this information to his principal, but merely returned the order, saying he could not complete it. The plaintiff thereupon gave the order to another broker, who succeeded in placing the risk with the defendant Vigors, neither the principal nor the second broker being aware of the information which had come within the knowledge of the first broker. Mr. Justice Day held that the plaintiff was entitled to recover, there being no concealment on the part of the plaintiff, the knowledge of the first broker not having become the knowledge of the plaintiff, nor of the second broker. The Court of Appeal reversed this judgment, but the House of Lords restored it. In the second case (*Blackburn* v. *Haslam*),[3] where the policy was effected by the first broker after the unfavourable news had come into his possession, it was held in Queen's Bench that his concealment vitiated the policy. There was no appeal. The comparison of the cases is instructive; the difference of the knowledge of the two brokers was decisive as regarded the validity of the policies they effected.

Addenda.

Summary.—The results of the preceding discussion may be put briefly thus: misrepresentation and concealment can never occur when a statement is made of what is *substantially* the truth, and the whole truth, respecting the risk under submission, an obligation which in the case of concealment is incumbent on the underwriter as well as on the intending assured. From this it is evident that in a genuine valid insurance neither party is permitted to forget the cardinal requirement of perfect, unbroken good faith (*uberrima fides.*)

[1] L.R. 12 App. Cas. 531. [2] 21 Q.B.D. 144.
[3] 21 Q.B.D. 144.

CHAPTER XVII

GENERAL AVERAGE

AT the close of the discussion of the expenses dealt with under the Sue and Labour Clause (p. 126) it became necessary to distinguish and separate them from certain other classes of expenditure which were designated General Average Expenditures. The opportunity will now be taken to consider not only these expenditures, but also the nature of General Average and the forms it may assume.

Early Sea Law.—It must first of all be noted that one of the earliest remnants of ancient maritime law preserved to us deals with jettison made for the sake of saving ship and cargo, and with the way in which loss arising out of such jettison was to be treated both as to its final incidence and to its apportionment.

In the Sententiæ of Paulus, written about A.D. 200, the following passage occurs (Book ii. Tit. 7):—

On the Rhodian law:

(1) When jettison of goods takes place for the purpose of lightening a ship, let that which has been jettisoned on behalf of all be restored by the contribution of all.

(2) If a ship or mast be lost by the force of a tempest, the shippers are not held to contribution, unless the ship was saved by their tearing out the mast for safety sake.

(3) If after lightening by jettison a ship perishes and the goods of some are hauled out by divers, it is decided that account is to be taken of him who jettisoned goods while the ship was safe.

(4) It is proper that goods discharged into boats for the sake of lightening the ship, and in consequence lost, be made good by the contribution of the goods saved in the ship, but if the ship is lost no account is taken of the boat saved with goods.

(5) A collection of the contribution for jettison shall be made when the ship is saved.

In the Digest of Justinian, Book xiv. Tit. 2, headed "On the Rhodian Law respecting Jettison," issued about A.D. 530, the words of Paulus are found put thus (f. 1):—

> By the Rhodian law it is provided that when a jettison of goods takes place for the purpose of lightening a ship, that which has been jettisoned on behalf of all is restored by the contribution of all.

In the same title at f. 9 an extract is given from Volucius Maecianus, who flourished about A.D. 150:—

> The petition of Eudaimon of Nicomedia to the Emperor Antonine: Lord Emperor Antonine, having made shipwreck in Italy, we were pillaged by the customs-farmers inhabiting the Cyclades Islands. Antonine replied to Eudaimon, "I indeed am lord of the world, but the law [is lord] of the sea. Let this be settled by the Rhodian law (which has been devised for nautical matters) in so far as it is not opposed to our laws. Such also was the judgment of the late [Emperor] Augustus."

Earlier references in Roman literature acquaint us with the commercial fame of the Rhodians, and a compilation of sea laws exists which was known as the Maritime Law of the Rhodians. The best authorities consider that this compilation is not genuine in the sense of being the Rhodian law which is referred to in the Digest.[1] It is striking that the first extract from the Digest given above is word for word what appears in Paulus prefixed by the reference to Rhodian law. It would almost appear as if Paulus had taken his wording from an actual Rhodian statute, the existence of which was known to the compilers of the Digest. Certainly the first paragraph of Paulus is of entirely different grammatical construction from the following four. Had the writer desired to convey that all five paragraphs came from the Rhodian law he could easily have done so. Besides, the phraseology of the Digest seems to indicate that (1) Paulus took his wording from what the compilers of the Digest believed or knew to be some Rhodian statute, and that (2) the Rhodians had a statutory or a customary law dealing with maritime affairs of all kinds. Otherwise there would be no point in giving the title its very definite

[1] See Robert D. Benedict, *What do we know of the Rhodian Maritime Law?* (Brooklyn Institute Lecture, 25th Feb. 1897).

heading, and in relating the petition of Eudaimon which had nothing to do with jettison.

It is, of course, quite possible that the name Rhodian Law was also applied to what was not so much the statutory law of Rhodes as the customary law of the Levant. In any case, the provision regarding jettison quoted above has been cited as "the Rhodian Law" from the days of the Digest until the date of decisions given in the English courts within the last decade.[1] The practice sanctioned in the Digest with regard to losses by jettison has been extended to other losses. Even in Roman law it was applied to many sacrifices of somewhat similar nature, and it has later been developed into a principle according to which all extraordinary sacrifices and expenditures made or incurred voluntarily in order to avert from the whole venture some threatening peril, are divided *pro rata* over the whole of the items composing the venture. It is this involution of the *whole* venture in the payment for the loss or damage that is indicated by the word general, or common, or gross, in the phrase general average, common average, or gross average (*avarie grosse*, *grosse havarei*), which is the name used in modern commerce to denote loss arising from voluntary jettison and other similar casualties.

General Average not primarily an Insurance Liability. —It is clear, from the preceding, that the thing called general average is not in any way dependent on insurance for its existence: there is a liability of cargo-owner and shipowner to one another for general average quite independent of any contract of either with third parties, such as the contract of insurance is. In other words, general average properly and originally forms part of the obligations that arise out of the contract of affreightment,[2] and is only secondarily connected with insurance. The late Mr.

[1] *E.g.* Brett, L. J., in *Burton* v. *English*, 1883; Watson, L., in *Strang* v. *Scott*, 1882; Blackburn, L., in *Aitchison* v. *Lohre*, 1879.

[2] But in *Pirie* v. *Middle Dock Company*, 1881, 4 Asp. 390, Watkin Williams, J., said: "This right and its correlative obligation are not founded upon any contract, nor do they arise out of any relation created by contract between the parties: they spring from a rule of

Richard Lowndes, a past-master in all matters connected with this subject, remarked in the preface to the second edition of his classical work, *The Law of General Average*, 1874, that the subject of general average can never be as well understood as when it is studied apart from insurance, "with which it is only accidentally associated, and as an outlying branch of the law of affreightment to which it naturally belongs." If this distinction be clearly borne in mind, it will help to remove difficulties arising out of what may be described as a crossing or conflict of the various interests of the assured who may find himself involved in a disaster of the nature of general average.

Different senses of words "General Average."—It is worth remarking at the outset that, as a cause, result, or accompaniment of this conflict, we have a diversity of senses in which the phrase "general average" is employed. Sometimes it is used to denote the *loss* to be borne in common by all the interests concerned; sometimes to denote the *contribution* to be paid by each separate party concerned (each one in the proper proportion of his interest) towards making good that loss.

Meaning of "Average."—The word "average" did not appear in the ordinary Lloyd's policy until the addition of the memorandum in 1749, in which the words "free of average, unless general . . . free of average under £5 per cent . . . under £3 per cent unless general" occur. From this wording it appears that, by 1749, two kinds of average had been distinguished, average on the *particular* goods insured and *general* average.

Etymology of "Average."—The etymologists have not succeeded in throwing much light on the proper meaning of the word. It is striking that no language except English has preserved the termination occurring in the mediæval Latin *averagium*, which Ducange explains as signifying loss in transit, such as leakage; the French, Italian, Spanish (and in fact all the Romance languages), have taken their

law applicable to all persons who chance to have interests on board of a ship at sea exposed to some common danger: threatening the whole. . . . It is a law founded upon justice, public policy, and convenience."

form from the simpler mediæval Latin word *haveria*, *havaria*, or *averia*, which, however, usually means property, especially horses or cattle. It is so difficult to find a transition from this signification to that of loss or damage, that an attempt has been made to trace the Romance forms from an Arabic original *awâr*, meaning defect. The matter is further complicated by the discovery in mediæval legal English of the word *aver*, equivalent to live cattle, Latinised into *averium*, a word used in mediæval English law to denote the best live beast due to the feudal lord on the death of a tenant, a tax or impost. From this original was formed the word *average*, signifying the rendering of a service or the payment of a tax or contribution. As taxes or imposts are usually levied in some proportion to the means of the contributor, the word *average* came to acquire its specially English sense of "proportional" or "mean" (as in the phrases average cost, above the average, below the average, etc.).

Average in Fire Insurance.—What is in *fire* insurance termed the principle of average is simply that, in case the value of any insured goods exceeds the amount insured, the assured shall bear that proportion of any fire loss suffered by the goods which the excess of the value above the amount insured bears to the whole value: the assured is thus in effect his own insurer for part of the value.

"Avarie" in French Law.—There can be little doubt that as far as *marine* insurance is concerned the word *average* was suggested by or adopted from the French *avarie*. The Ordonnance de la Marine of Louis XIV. treats of averages in its seventh title:—

> Art. 1.—Every extraordinary expenditure made for ships and goods conjointly or separately, and all damage affecting them from their loading and departure until their return and discharge, shall be reputed averages.
>
> Art. 2.—The extraordinary expenses for the ship alone, or for the goods alone, and the damage affecting them in particular, are simple and particular averages; and the extraordinary expenditures made, and the damage suffered for the benefit and common safety of the goods and of the vessel, are gross and common averages.

General Average in English Law.—The idea of general average once being introduced into England, its

developments here can best be traced in the reports of the cases decided by the courts, whether these cases refer to the contract of affreightment — involving shipowner and cargo-owner, or to the contract of insurance—involving assured and underwriter.

Birkley v. *Presgrave*, 1801.[1]—The ship *Argo*, when entering Sunderland, her port of discharge, was caught by a squall of such violence that it was found necessary to let go the anchor. To secure the ship she was fastened by a warp to the south pier; but this warp parted. More cable was paid out, and the vessel was let drift alongside the north pier, to which she was fastened with hawsers and tow-lines, such as are generally used for mooring a ship. The captain was afraid that the *Argo* would be fallen on by another vessel drifting down on her; he therefore cut the cable and moored his ship to the pier with the cable. When he was doing this the other ropes broke, partly from the violence of the storm and partly from another vessel drifting down on the *Argo*. The shipowner claimed as general average the value of the hawsers and towing-lines as well as the value of the cable cut. The claim was disputed, and formed the subject of the leading case, *Birkley* v. *Presgrave*, 1801.[1] At the trial the claim for the hawser and towing-lines was withdrawn; it was admitted that as they had been used merely for the purposes for which they were provided, their value was not properly claimable in general average. But the value of the cable was claimed on the ground that it had been "appropriated to a different use from what it was originally intended for, and which contributed to the preservation of ship and cargo." It was in the course of this case that Mr. Justice Lawrence gave the following famous definition of general average: "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo comes within general average, and must be borne proportionally by all who are interested." In the judgment of Lord Chief Justice Kenyon in the same case we find the following: "All ordinary losses and

[1] 1 East 220.

damages sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship-owner. But all these articles which were made use of by the master and crew upon the particular emergency, *and out of the usual course, for the benefit of the whole concern*, and the other expenses incurred, must be paid proportionally by the defendant as general average." From these judgments we conclude that a sacrifice to be properly claimable according to English law as general average *must* be (1) voluntary, (2) extraordinary, (3) intended for the common safety of ship and cargo, and (4) incurred in an emergency.[1]

It *must not* be a loss (1) inevitable, (2) of things employed in the purpose for which they were intended, or (3) employed or sacrificed for the safety of any separate interest or interests. Tested by this criterion, it will be found that the value of a mast cut away[2] after it is in a state of wreck is not claimable; nor is that of hawsers parted when trying to hold a ship at her moorings or alongside a quay; nor is that of materials used to repair ship or cargo after damage at sea, or of anything sacrificed unnecessarily or without pressure of circumstances.

Baily (General Average, p. 19) adds to these another test, namely, that the act must be judicious. "No act," he says, "can be a general average act unless it is a justifiable act, and no act can be justifiable unless it is judicious; whence we arrive at the conclusion that a general average act must

[1] In *Pirie* v. *Middle Dock Company*, 1881, 4 Asp. 388, Mr. Justice Watkin Williams names five essentials—

1. There must be a common danger.
2. There must be necessity for the sacrifice.
3. The sacrifice must be voluntary.
4. There must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost, and consequently of no value.
5. There must be a saving of the imperilled property through the sacrifice.

[2] Who must order the sacrifice to render it valid as general average sacrifice? In *Ralli* v. *Troop* (Sup. Court of U.S., N. York, Mass. Register, 24th April 1895) it was held that the action of the municipal authorities of Calcutta in scuttling the *J. W. Parker*, jute-laden, on fire, was not a voluntary sacrifice.

be a judicious act. It becomes necessary, therefore, to determine in every case whether the act performed is judicious. To arrive at a correct opinion on this point, we must take into account *how matters stood at the time when the act was performed.* To judge of the actions of men by results alone would lead often to erroneous opinions." This test may be expressed more simply by saying that the sacrifice must be reasonable.

The safety of a venture may be secured, or an attempt may be made to secure it, not only by sacrifice, but also by the incurring of expenditure. This is seen in the following case :—

Job v. *Langton*, 1856.[1]—The bark *Snowdon*, on a voyage from Liverpool to St. John's, Newfoundland, ran ashore on the Irish coast. At low water the vessel was left high and dry ; before she could get off all the cargo and ballast had to be discharged ; after discharge the cargo was stored in Dublin. But to get the ship off a channel had to be cut ; she was got off with the assistance of a steam-tug, and was removed to Liverpool for repairs. It was agreed by both sides that all the expenses incurred in the misadventure, until all the cargo was discharged, were general average expenditures. But the question arose whether the expenses incurred after the whole of the cargo was taken out were chargeable to general average or fell properly upon the ship alone. This gave rise to the case *Job* v. *Langton*, 1856.[1] In the Court of Queen's Bench Lord Campbell pronounced these expenses not to be claimable in general average, but to be payable by the ship alone. All that he considered to be general average were the expense of discharge, the expense incurred while both ship and cargo were exposed to the same perils, which attempts were made to avert on behalf of both interests.

Claims by Salvors — Ransom from Captors. — Although the sacrifices and expenditures chargeable to general average are in the end made good by all parties interested, it does not follow that expenses incurred or payments made on behalf of both ship and cargo are general average. For such expenses or payments may in many cases fail to fulfil the criterion of general average

[1] 6 E. & B. 779 ; 26 L.J. Q.B. 97.

laid down in *Birkley* v. *Presgrave*:[1] they are not incurred or made to avert a danger then imminently threatening the destruction of the venture. For instance, if salvors pick up at sea a ship laden with cargo and take it into a port of safety, they may decline to liberate what they have picked up without getting payment of what they consider an adequate salvage. If such payment is effected by the shipowner, it is no doubt one beneficial to the whole venture; but it is not an expenditure incurred in emergency and to avert an imminent danger, and therefore it does not constitute general average.[2] On the other hand, a similar payment made to captors, whether in the course of declared war or irregular hostilities, or after seizure by pirates, may be a general average loss, as in such a case the question may be one between saving the venture by means of the payment, or suffering the venture to expire by capture or seizure of the vessel and its contents.

SCHUSTER v. *FLETCHER*, 1878.[3]—As with sacrifices, so with expenditures; what is incurred for the advantage of any number of separate interests, and not for that of the whole venture, is not general average. For example, in *Schuster* v. *Fletcher*, 1878,[3] a shipowner took an active part in saving and transhipping the cargo of his stranded ship. He brought the cargo to its destination, and by so doing earned his freight. There had been difficulty in identifying some of the cargo, owing to obliteration of marks, and some part of it being found unidentifiable had to be sold and the proceeds to be distributed. All this was done by the shipowner, who charged as remuneration for his work a sum debited partly to the separate interests salved and delivered and partly to general average. The case came before Chief Justice Cockburn, who in a most trenchant judgment decided that the services for which remuneration was claimed had nothing to do with general average. He said: "Here the shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he

[1] 1 East 220.

[2] In *Aitchison* v. *Lohre*, 1879, Lord Blackburn stated that salvage had always been recovered from underwriters as a loss by the peril insured against.

[3] L.R. 3 Q.B.D. 418.

might earn his freight. . . . A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to destination, and could only give up the task when it was hopeless.[1] As to the expense incurred in respect of the articles which were identified, it was incurred for his own benefit, for unless he had delivered the goods to the proper owner he could not have obtained his freight; and, as to those unidentified, he took no further trouble, but sold them through a broker, who received his brokerage.[2] In every respect, therefore, the charges cannot be supported."

Port of Refuge Expenses.—The class of expenditures which come most frequently into consideration in connection with general averages is that included under the words "Port of Refuge Expenses." But such expenses may be occasioned by two entirely dissimilar classes of accident. A vessel may put into an intermediate port either—

(1) Because the vessel has suffered such damage by storm as to necessitate repairs. Or,

(2) Because it is necessary to replace or repair some part of the vessel or her gear which has been sacrificed or intentionally damaged for the general safety.

In other words, she may put in to repair damage which is of the nature either (1) of particular average, or (2) of general average. In *both* cases, if the putting in has been a matter of necessity for the general safety, the inward expenses, such as towage and pilotage inwards and harbour dues, are charged to general average, as also the cost of

[1] Regarding these words, see Lord Herschell in the case of the *Sir Walter Raleigh* (*Rose* v. *Bank of Australasia*, H. L. 20th March 1894): "My Lords, I think that that is an overstatement of the law. He might elect to carry it on after the ship had been lost, but he is not bound to do so. 'It cannot be said that the task was hopeless when he was not able, at the cost of some trouble, to bring the cargo into port.' That is all that was said on the point."

[2] As to charges on unidentified cargo, see the case of the *Sir Walter Raleigh* (*Rose* v. *Bank of Australasia*, H. L. 20th March 1894), in which Lord Herschell gives his opinion that where the shipowner acts reasonably in incurring extraordinary expenditure for the benefit of the adventure generally, there is nothing in point of law that prevents his charging that expenditure upon those who are interested.

discharging the cargo and bringing it to warehouse. With regard to the other expenses, we are now in possession of judgments of the Court of Appeal and the House of Lords. In *Atwood* v. *Sellar*, 1879,[1] the *Sullivan Sawin*, from Savannah to Liverpool, put in to Charleston to replace her foretopmast which had been cut away for the general safety. She discharged her cargo, which was warehoused, and afterwards reloaded it and took it on to destination. The Court of Appeal decided that in such a case of putting in to repair injury caused by a general average act, the expenses of warehousing and reloading goods necessarily discharged to permit of the carrying on of repairs, the pilotage and other necessary expenses outward, are, equally with the inward charges and cost of discharge, recoverable as general average. On the other hand, in *Svendsen* v. *Wallace*, 1885,[2] the ship *Olaf Trygvason*, from Rangoon to Liverpool, sprang a leak and had for the common safety to put back to Rangoon. The House of Lords held that when a vessel puts in to repair such injury as this, namely, injury of the nature of particular average, the cost of reloading the cargo is not recoverable in general average, but forms a particular charge on freight.

This should be contrasted with the *Peshawur*, (before Alverstone, L.C.J., in K.B.D., 10th April 1908), where a steamer within a few minutes after leaving her loading berth at Antwerp, drifted with the tide, dropped anchor, and when trying to avoid other craft took the ground. Coming off later, with the assistance of tugs, she had to slip her anchor, and then struck the quay wall, seriously damaging her stern-post and rudder, the after peak filling with water. She was brought back to her loading berth, her cargo was discharged, and she was docked for repair. Some cargo was forwarded to destination by another vessel. The Lord Chief Justice held that the slipping of the anchor was not a general average act, that the return to loading berth was not putting back to a port of refuge, and that when the vessel got alongside the quay with the after peak full of water there was no peril common to ship and cargo.

[1] L.R. 4 Q.B.D. 342; 5 Q.B.D. 286. [2] L.R. 10 App. Cas. 404.

The unloading of the cargo, though necessary to the repair of the ship, was not a general average act, consequently damage done to the cargo by handling was not recoverable in general average. It will be interesting to note the effect of this judgment in reducing within smaller limits the sphere of general average.

It was stated above (p. 285) that losses to be properly claimable according to English law as general average must not be losses or damage of things employed in the purpose for which they were intended. In *Walthew* v. *Mavrojani*, 1870,[1] Lord (then Mr. Justice) Hannen stated this principle thus: "The proposition that general average includes all extraordinary expenses incurred for the purpose of continuing the voyage is not warranted by the principle which governs contribution to general average." There are two striking exceptions to this rule which are admitted by English average adjusters:—

(1) Jury rig.

(2) Damage to engines in working a steamer off the strand.

(1) It has long been customary to regard as recoverable in general average the value of materials used, destroyed, or cut up for the purpose of fitting a vessel with such temporary masting and rigging as she may require. There is no legal decision on the point, but the practice seems to have grown into undisputed custom. No doubt the object of the use or destruction of such materials is the completion of the adventure; that is to say, it is the object which the shipowner and master had in view from the beginning for the earning of an agreed freight, and not the preservation of the whole venture in an emergency. At the same time, the custom is not unreasonable in so far as the materials thus used are put to uses for which they were not originally intended. In practice the whole cost of jury rig is treated as general average; the cost of spare spars, actually put on board for use in case of accident, equally with that of ropes, etc., intended for the ordinary service of the ship, but utilised in such cases for rigging. Lord Blackburn in

[1] L.R. 5 Ex. 116.

Svendsen v. *Wallace*, 1885,[1] speaks of the practice as "one which is not in general inconvenient," and although, he continues, "it throws a considerable onus on those who impugn it to show that the particular circumstances are such as to render an adherence to the practice in that case against principle," he does not go so far as to say that it is justifiable on the principle of general average adopted by English law.

(2) *Damage done to engines in working a steamer off the strand* is one stage further away from true general average according to the English principle. For in this case the machinery is used simply to move the vessel; and although the circumstances of the work are not those originally contemplated when the adventure was commenced, yet the mode in which the engines move is exactly the same as when the vessel is being propelled by them at sea. That the machinery is worked under exceptional strain in such a case is almost certain, but that is, after all, only somewhat rough or unusual use of the ordinary appliances of the ship. It very seldom occurs that there is in such an operation any intentional sacrifice, although in many cases there may be in the mind of the master the knowledge that the order is a risky one and might result in damage. Lowndes (General Average, p. 119) tries to distinguish between the cases in which the engines are exposed to some extraordinary danger and those in which they are not; but as a rule claims are made for recovery in general average of the damage sustained by engines worked when a vessel is ashore irrespective of the peculiar circumstances of each case. There has hardly yet been time to form a custom on this point, and it is worth remarking that recently American underwriters of cargo in English steamers have refused to admit liability for their proportion of the amounts charged in general average under this heading. It is not easy to convince one's self that all the damage that has been attributed to this cause did actually result from it, and in many cases the engines have been worked in this excep-

[1] L.R. 10 App. Cas. 404.

tional way not for the prevention of any imminent danger, but simply to bring back the vessel to the proper channel or fairway.

In the case of the *Rodney*, 1904, in K.B.D. (*S.S. Trafalgar Co.* v. *British and Foreign M. I. Co., Ltd.*), it was decided that as the vessel was not in peril there was no general average, and the damage done to the engines by working to float the vessel was not allowed.

In close connection with damage to engines occasioned by working a steamer off the strand, stand the items of coals and other stores expended in such an operation. The inclusion of these items as general average has been strongly opposed, and it certainly seems that if the inclusion of damage to engines in working off is doubtful when regarded in the light of strict principle, the inclusion of coal and engine-room stores is more than doubtful. For these supplies are actually consumed for the very purpose and in the very mode for which they were provided. If the inclusion of them is, even in case of imminent peril, regarded as not free from doubt, it is evident that where the vessel is in no danger, but is simply trying to put herself into position to complete the adventure, the inclusion of these items as general average can hardly be correct.

But in the case of the *Bona*, 1894 (11 Times L.R. 40), Sir Francis Jeune, President of the Admiralty Division, decided that when a vessel, having been stranded, was got off by her engines, which were in consequence damaged, the cost of repairs to the engines and the cost of the coal consumed in getting her off was a matter of general average. He held that the service which the coal was expended to provide was *extraordinary* in its nature.[1]

Wages and Provisions of Crew. — In the case of *Atwood* v. *Sellar*,[2] a question arose respecting the right to claim in general average the wages and provisions of the

[1] This judgment was confirmed by the Court of Appeal (Lord Esher, M. R., Lindley, L. J., Rigby, L. J.), 1st February 1895, 11 Times L.R. 209.

[2] L.R. 4 Q.B.D. 342; 5 Q.B.D. 286.

master and crew during detention for repairs at a port of refuge. In his judgment in the Court of Appeal, Lord Justice Thesiger said: "As a matter of fact, it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our courts as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average. . . . If, then, the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated. . . . But the authorities remain to be considered." The English practice has been not to allow to the shipowner these expenses, regarding them as part of what was paid for by the cargo-owner or charterer in the freight; and the increase of these expenses in consequence of detention at a port of refuge is viewed in exactly the same light as that arising from prolongation of the voyage by contrary winds occasioning no casualty. In *Fletcher* v. *Poole*, 1769, Lord Mansfield held that extraordinary wages and provisions expended during a vessel's detention at Minorca, where she had put in in distress for repairs, could not be allowed as a charge against the underwriter on the ship. In *Eden* v. *Poole*, 1785,[2] an action was brought to recover the expenditures for wages, provisions, and the demurrage during the detention of a ship at Ferrol, where she put in to repair. Marshall (p. 730) reports that "the underwriters contended that the freight and not the ship was liable for this loss, and that the charge of demurrage could not be allowed upon this policy" (on ship and goods). "Mr. Justice Buller was of this opinion, and nonsuited the plaintiff." Still more to the point is the decision in *Power* v. *Whitmore*, 1815,[3] on a policy on goods from London to Lisbon. The ship having sustained damage by winds and weather was obliged to put in to Cowes, where a considerable expense was incurred in repairs, in pilotage, in paying and maintaining the master and mariners, and in raising money for those purposes. On her arrival in Lisbon the assured "was adjudged by the

[1] Park, 89; Marshall, 730, 733 note.
[2] Park, 91; Marshall, 730, 733 note.
[3] 4 M. & Sel. 141.

maritime court there to pay general average in respect of the expenses, losses, and damages so incurred. . . . The Court held . . . that, as there had been no sacrifice of part for the preservation of the rest, none of the above expenses were properly the subject of general average by the law of England" (Marshall, p. 546). Lord Ellenborough said: "General average must lay its foundation in a sacrifice of a part for the sake of the rest; but here there was no sacrifice of any part by the master, but only of his time and patience." Lowndes (General Average, p. 241) reports that in *Wilson* v. *Bank of Victoria*, 1867,[1] Mr. Justice Blackburn, alluding to the matter, incidentally spoke of the English practice as a matter settled and well known.

Demurrage.—As the English law makes no allowance in general average for such actual outlays of the shipowner as wages and provisions at a port of refuge, it also refuses to recognise the shipowner's claim for delay of the ship at such port; in other words, for demurrage at a port of refuge. Similarly, the cargo-owner is not entitled to any recovery such as interest on the value of his property for the period of delay. Claims of this nature are not so much claims for actual loss as for failure to realise anticipated profit. In collision cases claims of this nature are admitted.

Substituted Expenses.—Suppose that in the cases of the *Sullivan Sawin* (*Atwood* v. *Sellar*),[2] and the *Olaf Trygvason* (*Svendsen* v. *Wallace*),[3] dealt with above (pp. 289 and 292), the captains of these vessels had found that storage in lighters would be cheaper than warehousing ashore, it is evident that it would have been to the interest of all concerned in these ventures not to land the cargoes, but simply to transfer them to lighters to be reloaded thence when the repairs to the vessels were completed. In such cases the costs of putting into, keeping in, and loading from the lighters form what are known as Substituted Expenses. These are incurred by adopting a method of treating the case adopted in preference to the ordinary method on account of its comparative cheapness. They are divided in

[1] L.R. 2 Q.B. 203. [2] L.R. 4 Q.B.D. 342; 5 Q.B.D. 286.
[3] L.R. 10 App. Cas. 404.

the same proportion in which the total cost of the ordinary method of discharge, storage, and reloading is divided among these three headings. In the same way it has become usual to make special agreements to apportion as substituted expenses such charges as for extra towage, undertaken to bring a crippled ship to her destination with the minimum of risk, and so to avoid a prolonged stay for repairs at an intermediate port, which might involve discharge of the cargo in whole or in part, and considerable dismantling of the ship, with the consequent charges for warehousing and reloading. There are two points to be noted in reference to such charges: they cannot be regarded as substituted expenses unless—

(1) They are incurred in connection with something done by the shipowner beyond what he has in his charter-party or bill of lading contracted to do.

(2) Their amount must be less than the general average charges would have been had the case taken the ordinary course.

Procedure of Recovery in General Average.—When a general average consists of sacrifices made by a ship, or of expenses incurred by a ship on behalf of the whole venture, the shipowner has a lien on the cargo for its share of these sacrifices or expenditures. The form in which this lien is usually enforced is a demand by the shipowner for the deposit of a sum sufficient to cover the liability of the consignee's cargo, or for signature by the consignee of an agreement securing payment of his proper proportion of general average when ascertained.

When the sacrifice is one of cargo by jettison, the shipowner, having by the jettison lost the freight payable at destination on the goods thus sacrificed, has also an interest in recovery in general average, and can thus exercise his lien in that case also, and thus act on behalf of the cargo-owner also (*Gillett* v. *Ellis*, 11 Illinois; *Heye* v. *N. G. Lloyd*, U.S. Courts).

But where the damage done consists merely in deterioration of the cargo without any diminution of it or change of species, such as would occasion a loss of freight, then

the only party interested in recovery is the owner or consignee of the damaged cargo. In the case of the *Sardinian*, the steamer after leaving Liverpool for the St. Lawrence took fire, and to prevent total loss of the venture her holds were flooded. The steamer put back to Liverpool. One of the shippers was not satisfied with the steps taken by the shipowners, and brought an action against them (*Crooks* v. *Allan*, 1879),[1] alleging that the shipowners "refused to give any assistance to enable" any one "to get an average statement made out, or to take any steps to enable the plaintiffs to recover contribution." In his decision Mr. Justice Lush, after saying that the shipowner is the only person who has the right to require security for general average contribution from the other parties to the adventure, proceeded thus: "The right to detain for average contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled, and of collecting the amount, and the usage has always been substantially in accordance with this law, and has become part of the common law of the land. I am therefore of opinion . . . that he (the shipowner) is liable in this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment."

Average Bonds and Deposits.—In the judgment of the Judicial Committee of the Privy Council in the case of the *Wavertree*, 22nd May 1897, Lord Herschell said, with reference to the preparation of a general average statement and the actual settlement and adjustment of the general average contributions, "It is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals would have to determine whether the owner of the goods was entitled to them, and what payment he must make

[1] 5 Q.B.D. 38.

to release them." The conditions under which cargo-owners may obtain possession of their goods pending the adjustment of a general average formed the subject in dispute in the case of the *Thales*. On a voyage from the River Plate to Liverpool she stranded in December 1883 near Bridport; tugs were engaged, cargo was jettisoned, and the vessel came off and proceeded to Liverpool. There the shipowners required a deposit of 10 per cent of the value of the cargo into an account in the name of the adjuster or shipowner, or both jointly, and the signature of an average bond in the form then regularly employed in Liverpool. Several consignees objected to this, but agreed to sign the London form of bond and to pay the deposit into a joint account of the shipowners and themselves. This proposal the shipowners declined; the consignees then paid under protest and raised an action against the shipowners (*Huth* v. *Lamport*, *Gibbs* v. *Lamport*, 1886).[1] In the Court of Appeal it was decided that in exercising his lien on cargo for general average the shipowner need not accept a bond or security; on the other hand the consignee is not bound to sign a bond. The shipowner has the right to demand a deposit, giving the consignee proper information so as to enable him to judge of the reasonableness of his demand and, if he considers it excessive, to tender a sufficient sum.[2]

Amounts made Good.—It is necessary to consider here what amounts are by the law of England recoverable in general average.

A. When the general average items are disbursements, the amount to be made good by the whole venture is the amount of the expenditures incurred plus the cost of providing the funds.

In former times, when communication was slower and more difficult and banking facilities fewer, a method very generally adopted to raise funds in a foreign port was bottomry. The general practice of maritime nations was to consider the raising of money on bottomry unjustifiable

[1] L.R. 16 Q.B.D. 442, 735.

[2] For the American law in this matter see *Wellman* v. *Morse* (Cir. Ct. of Appeals, 1896), 76 Fed. Rep. 573.

unless the master had communicated with the shipowner provided the delay arising from that course would not practically defeat the adventure, and had failed to raise the necessary money on his own security. But even with these restrictions extraordinary expenses incurred at an intermediate port were commonly met by bottomry.

B. When the items of general average are sacrifices these may be: (*a*) of ship's materials, etc.; (*b*) of cargo.

(*a*) In general average, as in particular (p. 207), the measure almost universally adopted in estimating damage done to a ship is the cost of the repairs found necessary to make good the damage.

Deductions from Cost of Repairs in General Average.—In the discussion of particular average on ship it was found (p. 219) that certain deductions are, as a matter of recognised custom, made from the cost of repairs. A similar provision by custom regarding costs of general average repairs has long prevailed. The deductions made in the case of wooden vessels are substantially the same as those made in particular average, nothing being taken off from the cost of repairs of damage sustained on the vessel's first voyage. As regards iron ships the Association of Average Adjusters accepted in 1887 and confirmed in 1888 the following rule:

> That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz.—

From Date of Original Register—

Up to 1 year old (A)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B)	One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connections: other repairs in full.

Between 3 & 6 years (C)	Deductions as above under clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.
Between 6 & 10 years (D)	Deductions as above under clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets and rigging; one-sixth to be deducted off chains and cables.
After 10 years (E)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (F)	The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

Similar provisions have been made for the now less frequent cases of repair of wooden vessels in general average. So far as the writer is aware, no case has come before the courts in which any question has been raised regarding these deductions. It will be found later (p. 316, and Appendix G) that these provisions have been practically approved by the representatives of the maritime nations of Europe and North America.

(*b*) It is evident that when the sacrifice is one that involves the total loss of some of the goods, such as jettison, any method based on cost of repairs cannot be applied. The general principle regulating the amount to be made good is thus stated by Lowndes (General Average, p. 291), "The owner of the goods jettisoned is to be so compensated that he shall be in the same position, at the time and place of adjustment, as if not his goods, but those of some other person had been sacrificed."

From this principle two rules result:—

(1) That the values taken for sacrifices are those at

destination or at an intermediate port, according as the venture is completed or broken up before completion.

(2) That the amount made good for sacrifice itself contributes to the loss involved in the sacrifice.

The second point will come up again for consideration when contributing values are discussed. Dealing with the first, we find that in order to make the position of the owner of jettisoned goods the same as if his goods were delivered, he must receive the net market value of his goods, *i.e.* the price he would have received for them on delivery, less the charges which must have been defrayed before they could be sold, and would not have been payable had the goods been lost. For instance, if the goods are shipped with freight payable at destination, then as sacrificed goods have not reached their destination no freight is payable by the consignee; consequently, in such cases freight must be deducted from the market value in arriving at the amount to be made good to the consignee, and the freight remains a sacrifice for which the shipowner will receive the amount made good in general average. If, on the other hand, the goods have been shipped with freight prepaid, the consignee will be entitled to the market price without deduction of freight, and the shipowner will have no claim for freight sacrificed. If the freight is half prepaid and half payable on delivery, the consignee of cargo and the shipowner will each be entitled to claim one-half of the freight of the cargo sacrificed.

In the *Acaster*, (*Silva* v. *R. Livingston*, 1894) Barnes, J., decided that when a voyage is broken up short of destination, the loss of freight paid in advance which by the abandonment of the voyage became a total loss, is made good in general average.

If the sacrifice of cargo does not involve the total loss of part, but only damage to the cargo in whole or in part (*e.g.* by damage to cotton done by flooding holds with water to extinguish fire), the amount to be made good is ascertained by deducting the net value which the goods have on arrival from the net value of sound goods of the same quality. As the damaged goods are actually

delivered, the matter of freight does not come into this comparison.

Sacrifice of cargo involves sacrifice of freight at risk due by the receivers of the cargo at destination.

But if a vessel is under time charter, it might appear as if any detention of the vessel occurring in consequence of general average sacrifice might by the consequent loss of time and time freight constitute a claim in General Average for the amount of such consequential loss. The usual practice of British adjusters has been to disallow all such claims. This practice has been confirmed by the decision in the *Leitrim*, case (*Leitrim S.S. Co.* v. *British and Foreign M. I. Co., Ltd.*, 5th Aug. 1902; Barnes, J.[1]).

Contributing Interests and Values.—There still remain to be considered the interests which, according to English law, contribute to general average, and the values at which these interests are rated.

In Mr. Justice Lawrence's definition of general average in *Birkley* v. *Presgrave*, 1801[2] (see p. 284), the only interests expressly mentioned are ship and cargo. They are indeed the only material, tangible interests manifestly involved in the venture. But it is quite clear that the derivative or secondary interest freight, being that for which the venture was originally undertaken by the ship, is equally profited by the successful outcome of a general average sacrifice or expenditure, and ought, therefore, equitably to bear a proportionate share of the burden borne by the whole venture. The contributing mass thus consists of ship, cargo, and freight.

In the consideration of the amount to be made good for cargo jettisoned, it became evident that in order to distribute fairly the burden of loss arising from a general average sacrifice, it is necessary to provide that any amount made good bears the same proportion of the loss as is borne by the property saved. Consequently, whatever be the value on which any interest contributes, there must be added to it the amount made good for any sacrificed portion of that interest.

[1] 18 Times L.R. 819. [2] 1 East 220.

(1) *Ship.*—The value of contributing purposes of a ship is her worth to her owner on her arrival at her destination, or if the venture does not reach its destination, then the ship's worth at the place where the interests part company, *plus* value of materials made good in general average, *minus* cost of any repairs done after the general average act and before arrival at port of destination or place of separation of interest.[1]

(2) *Cargo.*—(*a*) If the ship reaches destination, market value on arrival, *plus* any amount made good in general average for loss of part or for deterioration, *minus* all charges which would not have fallen on the consignee had the goods been lost, such as landing charges, customs duties, expenses of sale, discount to buyers, and freight paid at destination.

(*b*) If the venture is broken up at an intermediate port, market value there with the same additions and deductions as in (*a*), with the exception that in such a case cargo laden in British ships has no freight to pay, while in foreign ships the freight payable is *pro rata* distance freight.

(3) *Freights.*—As has already been pointed out, it frequently happens that freight on goods is wholly or partly prepaid; this is termed "freight at the charterer's risk," as in case the vessel is lost he has paid the shipowner for services never performed. The remainder of the freight, *i.e.* the amount payable at destination, is termed "freight at the shipowner's risk."

(*a*) Whether the venture reaches destination as a whole or not, it is evident that the charterer's freight or advance freight is always implicitly contained in the market value of the goods; if it is stated separately it is only as a matter of convenience in accounts or adjustment, and being an actual disbursement of the shipper it is not subject to any deduction.

(*b*) On the other hand, the freight received by the shipowner at destination is reduced by the amount of the port charges and crew's wages incurred after the general

[1] For contributing value of a ship arriving as a constructive total loss see *Henderson* v. *Shankland*, Ct. Appeal, March 1896: 12 Times L.R. 250, 251.

average act. Had the general average act not been successful he would have lost his freight, but saved the subsequent port charges and crew's wages.

Of course, if the charterer has hired the vessel on such terms as make him liable for wages or port charges, he is virtually the shipowner *pro tempore* as regards those items, and in that case his freight is subject to the deductions ordinarily applied to shipowner's freight.

Ulterior Chartered Freight.—It is the English practice not to consider as a contributing interest any freight which is to accrue to the ship for carriage of a later cargo than that actually on board when the general average act occurs. It is difficult to see how cargo on one voyage can have a common interest with the freight to be earned for carrying cargo on a later voyage. Besides, the inclusion of ulterior chartered freight as a contributing interest might give rise to a general average claim on freight for a voyage which, in consequence of some disaster, could never be completed or even commenced. Also there would not be on board the ship, when the sacrifice or expenditure occurred, any physical or material substance on which a lien could be exercised that would affect the ulterior chartered freight in question. It consequently appears that this interest is too remote for inclusion in the contributory mass. The only case we have on the point is that of the *Brigella*, (*Temperley* v. *Mackinnon*, 1893),[1] decided by Mr. Justice Barnes. In that case the steamer sailed from Liverpool without cargo, on 24th August 1891, in order to take up an engagement to carry a cargo from a United States Atlantic port to a port in the United Kingdom or Continent between Bordeaux and Hamburg. Meeting with bad weather she began to leak in her ballast tanks, and on 26th August put in to Holyhead. On the 29th she left Holyhead to return to Liverpool for repairs, and after their completion she sailed again on 16th September. The vessel was afterwards loaded at Baltimore and discharged her cargo at Barrow. An average adjustment was prepared according to the alleged provision of American law,

[1] 9 Times L.R. 399.

under which the chartered homeward freight was burdened with a portion of the Liverpool expenses. The underwriters on that freight were asked to pay what was put down as their liability, but refused. The court found in their favour; but that was expressedly not because the special interest insured with them was not liable, but because the court held that there was really no general average expenditure.

Again, in the case of a steamer in ballast under charter proceeding to her loading port, it has been decided that the chartered freight shall contribute to general average sacrifices.[1]

Amount Payable by each Contributing Interest.—The determination of the amount of general average payable by any one interest is a matter of simple proportion: if the whole contributing mass pays the whole amount of general average sacrifice, the contributing value of each separate item pays in the same proportion.

Foreign Theories and Practice of General Average.—The preceding pages are an attempt to give a brief account and a few illustrations of the principles adopted by the English law in deciding what constitutes general average, and applied by the English courts to cases under their jurisdiction in which the venture closes in the United Kingdom, its colonies or dependencies.[2] They are principles based on considerations of the attainment of *Common Physical Safety*. The jurisprudence of Continental countries has proceeded upon quite a different principle, upon considerations of *Common Benefit*, according to which the safe completion of the venture in question is the end contemplated. This radical difference in view results in an entire divergence in practice.

Proper Place and Law of Adjustment—(1) *Venture Completed.*—In one point the systems agree: as the time

[1] The *Yestor*, (*Carisbrook S.S. Co.* v. *London and Prov. M. I. Co.*), Ct. Appeal, 7th Aug. 1902: 18 Times L.R. 783, confirming judgment of Mathew, J., in lower court.

[2] For the practice of English adjusters, see Rules of Practice of Average Adjusters' Association, printed in Appendix H.

of the completion or dissolution of the venture is the time for settling finally all matters of common interest or mutual obligation among the various parties to the venture, such as general average, these questions are regulated according to the law of the country in whose jurisdiction the venture happens to be when the interests are separated from one another. In the case of a safely-completed voyage that country is of course the country of destination; so that maritime nations generally have adopted the rule of adjusting general average in accordance with the law prevailing at the port of destination, unless special agreement to the contrary has been made in the contract of affreightment. In the decision of *Lloyd* v. *Guibert*, Exchequer Chamber,[1] it was stated: "The adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, as they must be taken to have assented to adjustment being made at the usual and proper place, and as a consequence, according to the law of that place."[2]

But this rule can evidently not be applied in all its simplicity to cases in which a vessel is bound to several ports with cargo for each of them, unless indeed the casualty resulting in general average occurs between the second last and the last port of discharge. There is no doubt that if the accident occurs before the vessel reaches her first port there is a great deal to be said in favour of adjusting the average there, as that is the point at which the venture, as it originally was, breaks up. On the other hand, the benefit derived by cargo destined for the second or other later ports is not acquired by the owners or consignees of these goods until they are actually delivered at destination, and in case of their being lost before arrival at destination, the owner or consignee is left in exactly the same position as if the general average act had resulted unsuccessfully and the whole venture had been

[1] L.R. 1 Q.B.D. 115.

[2] In the *Wavertree* case, 1897, the House of Lords decided that when an average statement is necessary a shipowner is not bound to have it drawn up at the port of discharge. 13 Times L.R. 419.

lost. As far as the writer is aware, no case of this kind has yet come before the courts. Lowndes (General Average, p. 274) mentions the course adopted in the matter of the *Sarnia*, from Liverpool with cargo to Halifax, N.S., and Portland, Me. This steamer put back to Liverpool for repairs and discharged her cargo. A joint adjustment was made up by a Canadian adjuster and a United States adjuster, showing the amounts payable by the Halifax cargo as general average according to English law, and those payable by the Portland cargo as general average according to American law.

(2) *Venture not completed.*—If the voyage is justifiably broken up at an intermediate port the general average is adjusted in accordance with the law of that place and the state of facts then and there. In *Fletcher* v. *Alexander*, 1868,[1] a vessel with a full cargo of salt from Liverpool to Calcutta stranded near Wexford. A large portion of the cargo was jettisoned, and all the remainder of it except 100 tons was so damaged as not to be fit for taking on to destination. The vessel put back to Liverpool and the voyage was abandoned. It was held that the average must be settled at Liverpool and in accordance with English law. On the other hand, in *Hill* v. *Wilson*, 1879,[2] the vessel *Virago* sailed from Riga to Hull. She stranded and was towed in to Copenhagen, where about eight-ninths of the cargo was sold. Of the remaining ninth about one-half was forwarded to Hull in other vessels, and the other half was taken on by the *Virago* herself to Hull. It was held that the original voyage was not broken up at Copenhagen; consequently it was irregular to adjust the average at Copenhagen or in accordance with Danish law.

Acceptance of Foreign Law by English Law. It is evident from the preceding paragraph that English law in certain cases recognises the validity of adjustments of general average based on the law of foreign states. This is, in fact, one of the great difficulties of the subject of general average. It is only too easy to conceive cases in

[1] L.R. 3 C.P. 375. [2] 4 C.P.D. 329.

which a cargo destined to several ports in different countries is carried in a ship belonging to none of these countries, and the venture is broken up in still another country; for example, an English vessel from the River Plate to Havre and Hamburg put in to Lisbon and there the voyage broken up. The average in such a case would, according to English law, be properly adjusted at Lisbon in accordance with Portuguese law, unless the contract of affreightment contained some stipulation to the contrary. In the case of the *Delambre*, a British steamer, on a voyage from the River Plate to Bordeaux and Antwerp, an accident leading to general average sacrifice or expenditure occurred before she reached Bordeaux, and the average was adjusted according to the law prevailing at Bordeaux, the first port of delivery. This was the adjustment of the liabilities of ship and cargo to one another, which was binding on the interests concerned. With the secondary liability of the underwriters to their assured we will deal later.

As the English law thus in a sense incorporates the law of the country in which a maritime venture is dissolved or completed, it follows that the English shipowner and merchant are frequently, according to their own law, liable for contribution to general average which differs in amount and in its constituent items from the amount for which they would have been liable had the venture closed in a port of the United Kingdom, its colonies, or dependencies. As has been already stated, the Continental countries have proceeded on a principle quite different from the English one, and there are important differences between the practice prevalent in the United States and that in the United Kingdom.

Diversities of English and Foreign Law and Practice.—That these diversities may be of serious moment is evident when it is remembered that they may result not only from difference of contributing value, but from inclusion or rejection as general average of items which in other countries would be rejected or included. The following table gives a rough sketch of the *contributing values* prevailing in different maritime countries :—

Ship.—In England: its worth to the owner at the time when it ought to contribute (*i.e.* at destination of the venture or at place of outlay or sacrifice).

In United States: its value on arrival at place of discharge less repairs.

In France, Italy, Portugal: half its value at destination or at point of separation of interests, as the case may be.

In Germany, Holland, Belgium, Denmark, Norway, Sweden, Russia, Spain, Brazil, Argentina: its value at the end or beginning of the venture, or where the interests part company, as the case may be.

Cargo.—In England and United States: net market value at port of destination or of separation of interests, as the case may be.

In other European and American countries substantially the same valuation prevails.

Freight.—In England: gross amount at risk less port charges and wages incurred after the general average act.

In United States varies:

In Massachusetts, Maryland, Pennsylvania, South Carolina and Louisiana, two-thirds of the gross freight.

In New York, Virginia, South Carolina, Georgia, Texas and California, half of the gross freight.

In Germany: two-thirds of the gross freight earned.

In Holland and Argentina: the freight, less wages and provisions.

In Belgium: either the net freight or one-half of the gross freight.

In Denmark: four-fifths of the gross freight.

In France, Italy, Spain, Portugal, Sweden, Norway, Russia: one-half of the gross freight.

As regards *amounts made good* there is at least equally embarrassing variety, for instance in the item of crew's wages and provisions during detention in port. As has already been explained (p. 293) this item is not admitted by English practice as general average; in France it is not general average unless the ship is chartered on time; in every other European country (with the possible exception of Spain), it is general average, as it is in the United States and all South America. It may indeed be said that no two of the leading maritime states of the world agree completely in their provisions regarding general average. The growth of commerce and the adoption by all maritime countries of the law and practice on general average of the

country in which a venture is dissolved or completed, compelled shipowners and merchants to inform themselves respecting the provisions of foreign codes and decisions. To meet this need comparative tables of the general average provisions of different maritime states were drawn up and published: the first, the writer believes, were issued by Mr. Philip H. Rathbone of Liverpool. In the first edition of his *Law of General Average*, 1873, Mr. Richard Lowndes of Liverpool included a similar table; and in his *Grosse Haverei*, 1884, Mr. Rudolph Ulrich of Berlin printed a still more detailed table.

International Systems of General Average.—As early as 1860 the increasing frequency and irritating uncertainty of these divergences and dissimilarities led to the formation of a congress of English and foreign jurists, adjusters, merchants, shipowners, and underwriters, who made it their business to tabulate and examine the general average law of different maritime nations, holding meetings at Glasgow in 1860, London 1862, and York in 1864. At the last of these meetings a set of International General Average Rules was formed, known as the York Rules. But no practical effect was given to them, and it was not until the Congresses of the Association for the Reform and Codification of the Law of Nations at the Hague in 1875 and Bremen in 1876 that attention was again drawn to the matter. At the Antwerp Congress of the Association in 1877 the matter was again thoroughly discussed on the basis of the York Rules, and the result was the formation of a series of rules intended to be the basis of a uniform system of general average for all maritime nations, known as the "York and Antwerp Rules."[1] That these rules met some want was clear from the way in which they were

[1] It is interesting to observe that the committee of Lloyd's then expressed their strong feeling that "the differences which exist in various countries upon this subject would be best met by abolishing general average altogether. Possibly this cannot now be done; and if so, the committee consider that so far as the English practice is concerned any difference should be met by curtailing, not by enlarging the English rules." Compare Mr. Douglas Owen's *Reform of General Average* read at Lloyd's on 9th May 1894.

adopted in contracts of affreightment and of marine insurance—being made the subject of special contract, and so securing to the parties stipulating for them the settlement of their general average liabilities in accordance with their provisions in so far as these differed from the regulations of the country in which the venture was dissolved or completed. The York and Antwerp Rules were subjected to a revision at the Association's Liverpool Congress of 1890, and the result was an expansion of the rules as suggested by the experience of the preceding thirteen years. The revised rules were confirmed at the Genoa Congress of 1892, and this revised and expanded version is what is now meant when the York and Antwerp Rules are referred to. The text is printed in full in Appendix G. As regards deductions from repairs in general average it will be found to agree very closely with the Rules of Practice of the Association of Average Adjusters.

General Average as regards Affreightment.—It is clear from what precedes that so far as the contract of affreightment goes, the only meaning that can be attached to the words "liability of an interest for general average," is liability to contribute to general average losses $^{\text{and}}/_{\text{or}}$ expenditures in the proportion which the contributing value of the named interest bears to the value of the whole contributing mass.

If there were no such thing as insurance, the whole course of a general average would be as described, each interest would contribute through the purse of its owner, and that would end the matter.

Application of General Average to Insurance.—But if the owner of any interest is insured on such terms that he has the right of claiming from his underwriter indemnity for his loss under this head, what amount is he entitled to claim? If the interest is insured for as much as the amount at which it is valued for contribution, the assured obviously has the right of recovering from his underwriter the full amount of the contribution demanded of him: if it is insured for less, then, in accordance with the principles of indemnity and proportion, the assured is entitled to

claim from the underwriter that proportion of the contribution of his interests which the amount insured bears to the amount at which the interest in question is assessed for contribution.

In accordance with the preceding results, we will for the present understand that in all cases in which the marine policy is concerned the words "general average" mean what has been termed with greater explicitness "general average *contribution*."

Proceeding in this sense, we may say that by the ordinary form of policy the English underwriter contracts with his assured to pay his proper proportion of the general average contribution demanded from the interest he insures. As long as the termination of the venture takes place in the United Kingdom, its colonies, or dependencies, the general average being determined and assessed according to English law, is to the extent of his proper proportion as binding for the underwriter as it is for the merchant or shipowner whom he insures.[1] But when the general average obligations of shipowner and merchant are determined by the provisions of foreign law, a question arises as to the extent of the obligations of the English underwriter who contracts to cover against general average. Mr. Justice Park (*Insurance*, pp. 629–631) gives details of three cases in which action arose on the liability of underwriters on Lloyd's policy form for general average contribution paid by the assured in accordance with foreign adjustment, *Walpole* v. *Ewer*, 1789,[2] *Newman* v. *Cazalet* (n.d.),[2] and *Power* v. *Whitmore*, 1815.[3] In the two former clear evidence was given that "the adjustment was correct according to the

[1] When the contributing value is lower than the insured value, the *total* amount of contribution is apportioned over the underwriters *pro rata* of the amounts which they insure. When the contributing value exceeds the insured value, the *pro rata* share attaching to the difference between them falls on the shipowner, as being his own underwriter for that amount. *S.S. Balmoral Co.* v. *Marten*, H.L. 5th Aug. 1902: 18 Times L.R. 802.

[2] Quoted in Park's *Insurance*, pp. 629, 630; and Beawes, *Lex Mercatoria*, 1789, p. 477.

[3] 4 M. & Sel. 141.

law and practice of the port where it was settled" (Arnould, p. 963), and the underwriters were held liable to pay. In his judgment in *Newman* v. *Cazalet* (n.d.),[1] Mr. Justice Buller remarked: "On the general law the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of English law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." In *Power* v. *Whitmore*, 1815,[2] the same point came before the Queen's Bench. Marshall (p. 546) reports the result of the decision (per Lord Ellenborough) that "the general average to which the underwriters are liable is that alone which is admitted by the law of England." Park (p. 631) makes the judgment much less positive, as he admits that this holds only "where the parties are not to be understood as having contracted on the foot (*sic*) of some known general usage among merchants." But there is no doubt that the impression did prevail, that the effect of the decision was that underwriters in this country could in *no case* be bound by a foreign adjustment. Arnould (p. 964) corrects this impression, and quotes from Lord Ellenborough's judgment: "This contract (*i.e.* the policy) must be governed in construction by the law of England, where it was framed, unless the parties are understood as having contracted on the footing of some other known general usage among merchants relative to the same subject, and shown to have obtained in the country, where by the terms of the contract the adventure is made to determine, and where a general average (if such should under the events of the voyage be claimed) would, of course, be demandable."

Foreign General Average (F.G.A.) Clause.—To prevent dispute on this matter a special clause was formed, called the "Foreign General Average Clause." Its forms vary, *e.g.*—

[1] Quoted in Park's *Insurance*, pp. 629, 630; and Beawes, *Lex Mercatoria*, 1789, p. 477.

[2] 4 M. & Sel. 141.

"General average payable according to foreign custom." Or,

"General average payable according to foreign statement." Or,

"General average payable according to foreign statement if so made up." Or,

(in the fuller form now adopted as Lloyd's clause)

"General average and salvage charges payable as per official foreign statement if so made up, or per York-Antwerp rules if in accordance with the contract of affreightment."

But even a clause of this nature has not prevented dispute on the question of liability. In *Harris* v. *Scaramanga*, 1872,[1] the question arose whether English underwriters using a clause of this kind were bound to contribute towards the deficiency in the amount needed to meet a bottomry bond—this deficiency having been in a foreign statement properly adjusted as general average and apportioned over all the interests concerned in the venture. The courts held the underwriters liable. It seems that the variations in three phrases, *foreign statement*, *foreign custom*, and *foreign official adjustment if so made up*, indicate various states of feeling in underwriters' minds. In *Harris* v. *Scaramanga*,[1] Chief Justice Bovill decided that in agreeing to settle according to foreign statement, underwriters are bound by such statement though it be wrong. This led to the adoption of *foreign custom*, which was intended to include all foreign legal and customary regulations properly applicable to each case as it arose. But the word "custom" is often taken in a narrower sense to indicate the established local practice of any particular port, and not the law or general commercial custom of the country in which it is situated. That this difference may be serious is well known to those who know how different are the local commercial customs of Marseilles from those of Dunkirk or Havre, or, to take an even more striking case, the customs of Odessa from those of St. Petersburg. This consideration led to the framing of the

[1] L.R. & C.P. 481.

third form—*foreign official adjustment if so made up.* In most Continental countries average adjusters hold official appointments at the ports where they practise, and their statements have the effect of a judgment in a court of first instance. But recent cases seem to demonstrate that this form of clause has its dangers, and for the moment there is rather a feeling in favour of return to *foreign custom.*

Application of York-Antwerp Rules.—Where the contract of affreightment contains a provision that general average shall be settled according to York-Antwerp rules, these rules are applied in the adjustment on every point with which they deal. But as they do not form a complete code of general average law, the points not dealt with in them are treated in accordance with the law of destination or other proper place for adjusting the claim. There is room for some interesting questions as to the effect on underwriter's liability of the application of York-Antwerp rules at a destination (or port of dissolution of the venture) where the law of the land is in some respects more favourable to one or other of the concerned than the York-Antwerp rules. It is probable that these questions will first arise in the United States. But if it is borne in mind that the liability for general average on the policy of insurance cannot be greater than that of the assured on the contract of affreightment, it is clear that the issue must be fought out on the latter documents before the question can be raised on the former. When the matter is viewed in this light, it appears that it is almost certainly wrong to import into the consideration of general average such ideas as are derived from the fact that the marine insurance policy is a document for the protection of the assured, and that supplementary clauses added to it must be read as added for his additional protection. The liability for contribution exists quite independent of any right to transfer that liability to third persons.

General Average Loss as distinguished from General Average Contribution.—Up to this point we have dealt with liability for general average as being what is expressed

more fully as liability for contribution to general average. There seems to be no room for doubt that had questions of insurance never come in the matter would have remained on that basis. It was commonly so accepted up till 1868, when the case of *Dickenson* v. *Jardine*[1] was decided. The facts in that case were: A shipment of 641 packages of tea was insured per *Canute*, Foochow to London, including the risk of particular average, the policy in the usual form expressly naming jettison as one of the perils insured against. The vessel struck on a reef, and in the efforts made to refloat her 607 packages of tea were jettisoned. The merchant claimed the insured value of these packages from his underwriters, who refused to pay, alleging that their only liability was for general average contribution. It was held by the court (Bovill, C. J., Willes, J., and Montague Smith, J.) that the owner of the jettisoned goods having insured them against jettison *inter alia*, "has two remedies —one for the whole value of the goods against the underwriters, and the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both so as to be repaid the whole of his loss twice over." That is, the underwriter paying the loss direct will have recourse against all the parties to the venture for their proper contributions to general average. It was not decided whether the direct liability of underwriters came under the head of general average or of particular average, but the majority of average adjusters treated direct claims for goods or ship's materials sacrificed as if they were claims for particular average. This practice continued until the decision of the Court of Appeal in *Price* v. *A1 Ship's Small Damage Association*, 1889.[2] That decision was to the effect that general average sacrifices and particular average losses were of such entirely different character, that they could not be added together for the purpose of attaining the percentage of franchise stipulated in the memorandum. The result of this decision is best seen

[1] L.R. 3 C.P. 639. [2] L.R. 22 Q.B.D. 580.

in the rule of practice which was in consequence of it adopted by the Association of Average Adjusters in 1890 and confirmed in 1891 :—

"That in case of general average sacrifice there is under ordinary policies of insurance a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss ; that such loss not being particular average is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average."

The words "ordinary policies" in this rule are not free from ambiguity, but in the discussion that preceded the acceptance of the clause, it was explained that it was desired "by these words to refer pointedly to such policies as have no special clause inserted in them limiting underwriters' liability in cases of general average sacrifice."

Effect of Decisions in Dickenson v. Jardine and Price v. A1 Ship's Small Damage.—The result of these two decisions is that underwriters on a policy warranted free of particular average are now responsible for a partial loss by jettison or other sacrifice, if the assured chooses to claim it direct ; the underwriters being, of course, subrogated to the rights of the assured in any recovery he may make in general average from the other interests in the venture. This result is almost enough to make one doubt whether anything has been gained in consistency or simplicity by substituting general average *loss* for the general average *contribution*, which till 1868 was universally accepted as the meaning of the liability imposed on underwriters under the name of "General Average."

APPENDICES

APPENDIX A

Specimen Slip

3/93. X. Y. & CO.

S.....$ £75,000
S.....$ 75,000
M.....$ 60,000
K.....$ 50,000

12 mos. 30

Hull and M.

RDC. No. ¼. av. ea. val. 3. ~~15~~ days. Dev. Dkg. Cont., caused by coll ~~no-nc-cl.~~ In event of C. T. L. u/rs. to have no claim on Freight. F. C. & S. piracy excepted. neg.

~~90/~~ £5.

3000. R. B. L.
3000. J. S. Toulmin P/R [1]
5000 B & F pr.
3000. J. S. M.
1000. A H 1000 28/3
2000 J. C. S.
3000 T. & M.
2000 L. & P.
750 J. L. W 29/3
750 M. 29/3
1000 Glover B.
3000 Marten p.r.
900 B 29/3
2000 Tyser 29/3
600 ~~750~~ Vaizey 29/3 4
750 V. & H.
600 Reiss 29/3

150 B Elliott
1050 Baddeley
300 R C H P n/e [2]
600 H W F H
750 C A H 29/3
800 A A &c 29/3
300 C Hy 29/3 p.r
1650 TU n/e
150/
600 L pr
450 Rouse T
750 J. F. A 29/3
500 P. S. prorata
2000 E. H.
600 E C M 29/3
300 Chance n/e
500 Pitman & C 29/3
450 G S C 29/3

[1] P/r, pro rata.

[2] N/e, not entered.

600 Sands 29/3
300 Godwin 29/3
300 E N E 29/3
1500 Smiths &c n/e
400 Jupe 30/3
400/200 W 30/3
300 W. E. B. 30/3
1000 Canton } n/e
1000 Triton }
1500 B M
300 G H D 4/4
400 R.W.S.
300 Crocker & S
100 Angove 4/3
400 W A S 2 4/4
400 Anderson 44
p.r.

200 A W. Y. Y. ~~n/e~~ 4/4
300 Denny 4/4
100 ~~200~~ Round K 4/4
600 Nixon
200 Riley C 4/4
200 A J P
300 Catelin.
600 ~~700~~ Foster 21/8
200 E. F. S. & H 4/4
200 Archer C
100 A H G 4/4
200 W W n/e
500 T. K. $\frac{4}{4}$
1500 N. Zealand
1500 W. S.
100 Harris H & Co.

APPENDIX B

EXTRACT from Martin's *History of Lloyd's and of Marine Insurance in Great Britain*, pp. 46-48. Original, Tanner MS. No. 74, fo. 32, Bodleian Library, Oxford.

"IN the name of God. Amen. Be it knowne vnto all men by these presents that Morris Abbott and Devereux Wogan of London merchants, doe make assurance and cause themselues and euerye of them to be assured Lost or not Lost from London to Zante Petrasse & Saphalonia or any of them vpon woollen & Lynnen cloth Leade Kersies Iron & any other goods and merchandize heretofore Laden aboard the good Shipp called the Tiger[1] of London of the burthen of 200 touns or therabouts whereof is master vnder god in this presente voyadge Thomas Crowder, or whosoever ells shall goe for master in the said shipp or by whatsoever other name or names the said shipp or the master thereof is or shalbe named or called. And it shall & may be Lawfull for the said shipp to touch & stay at any ports & places on this side Zante as well on the Barbary as the Christian shoare, & ther discharge relade & take in any goods merchandize & mony at the discretion of the master & ffactors vppon the aduenture of the Assurers without preiudize to this assurance: And if in case any part of the said goods shalbe discharged out of the said ship at any port or places before mentioned the assurers shall take noe bennefitt or aduantadg therby in case of Losse or aueradge vppon the rest of ye said goods. But the assurers shall still beare their whole adventures if ther be so much goods remayning aboard ye said shippe as shalbe assured ye assureds aduenture of 10 per Co. deducted in as full & ample manner, as if noe parte of ye said goods had beene discharged out of ye saide shippe before hir cominge to hir last porte of discharge any order custome or vsadge or any thing in this pollacie mentioned to the Contrary notwithstandinge. Beginning the Aduenture from the day & howre of the Lading of the said

[1] Cf. Shakespeare, *Macbeth* i. 3, 7 (written between 1603 and 1610):

Her husband's to Aleppo gone, master o' the *Tiger*

And see Clark and Wright's note in Clarendon Press Series edition, citing Sir Kenelm Digby's mention in his journal of 1628 of "the *Tyger of London* going for Scanderone," *i.e.* Alexandretta. Hakluyt (*Voyages*) gives letters and journals of a voyage of the *Tiger of London* to Tripolis in 1583. Shakespeare again mentions a ship called the *Tiger* in *Twelfth Night*, v. 1, 65:

And this is he that did the *Tiger* board.

cloth Lead Kersies Iron &c. aboard the same shipp at London aforesaid, & soe shall continewe & endure vntill such tyme as the same shipp with the same Cloth Lead Kersies Iron &c. shalbe arrived at Zante Petrasse & Saphalonia or any of them aforesaid and the same ther discharged & laide on Land in good salfety. Touching the Adventures & perills which wee the assurers hereafter named are contented to beare, & doe faithfully promisse by these presents to take vppon vs in this presente voyadge are of the Seas, men of warr, fyer, enemyes pirratts rovers theeues, jettezons, Lettres of marte & countermarte arests restraints, & deteynments of Kings & princes and all other persons barrtary of the master & mariners, & of all other perills Losses & misfortunes whatsoeuer they be or howsoever the same at any tyme before the date hereof hath chaunced or heereafter shall happen or come to the hurte detryment or damadge of the said cloth Lead Kersies Iron &c. or any parte or parcell thereof. Allthough newes or knowledge of any losse have already come or by the Computation of one League or three English myles to one hower might have come to London before the subscribinge hereof, any order cvstome or vsadge heretofore had or made in Lumbard street or nowe within the Royall exchange in London to the contrary notwithstandinge. And that in case of any misfortune it shall & may be Lawfull to the assureds ther factors servants & assignes or any of them to sue Labor & travile for in and aboute the defence salfegard & recouerie of the said Cloth Lead Kearsies Iron &c. or any parte or parcell therof without any preiudice to this assurance. To the charges wherof we the assurers shall contribute eachone accordinge to the rate & quantety of his Some herein assured. Yt is to be vnderstood that this presente writinge & assurance beinge made and registered according to the Kings Majesties order & appoyntment shalbe of as much force strength and effect as the best & most suerest pollacie or writinge of assurance which hath binne euer heretofore vsed to be made lost or not lost in the aforesaid streete or Royall Exchange. And soe wee the assurers are contented & doe promise and binde ourselues & euerye of vs our heyres executors & goods by these presents to the assureds the executors administrators & assignes for the true performance of the premisses, Confessing ourselues fully satisfied contented & paid of & for the consideracion due to vs for this assurance by these presents at the hands of the said Morris Abbott & Deuereux Wogan after the rate of fower pounds per C°. And in Testimonye of the trueth wee the Assurers have hereonto seuerally subscribed our names & somes of moneye assured yeoven in the office of assurance within the Royall exchange in London the ffyfteenth day of ffebruary an°. 1613."[1]

[1] The Tanner MS. No. 74 fo. 32, has been most carefully collated for this reprint. I am informed that it contains no names of insurers or amounts insured. The absence of these is a matter for regret.—G.

EXTRACT from Marsden's "Admiralty Cases, 1648-1840" pp. 267 and 268.[1]

Policy of Insurance

THE following policy of insurance on the cargo of the *Maria*, dated 29th June 1692, is taken from the Admiralty Assignation Book labelled 337 :—

In the name of God. Amen. Peter Joy of London, merchant, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth may or shall appertain in part or in all doth make assurance and causeth himself and them and every of them to be insured lost or not lost from Stockholm to London, upon any kind of goods and merchandizes whatsoever loaden or to be loaden aboard the good ship called the *Maria*, burden . . . tuns or thereabouts, whereof . . . is master under God for this present voyage Bary master or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof is or shall be named or called: beginning the adventure upon the said goods and merchandizes from and immediately following the lading thereof aboard the said ship at Stockholme, and so shall continue and endure untill the said ship with the said goods and merchandizes whatsoever shall be arrived at London and the same there safely landed. And it shall be lawfull for the said ship in this voyage to stop and stay at any ports and places between Stockholme and London, without prejudice to this insurance. The said goods and merchandizes by agreement are and shall be valued at . . . sterling without farther accompt to be given by the Assureds for the same. Touching the adventures and perils which the Assurers are contented to bear and do take upon us in this voyage they are of the seas, men-of-war, fire, enemies, pirats, rovers, thieves, jettesones, letters of mart and countermart, surprizals, takeings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition or quality whatsoever, barratry of the master and mariners, and of all perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandize or any part thereof; and in case of any loss or misfortune it shall be lawfull to the assured . . . factors servants and assigns to sue labour and travel for in and about the defence safeguard and recovery of the said goods and merchandizes or any part thereof without prejudice to this insurance, to the charges

[1] Reproduced with the permission of the publishers, Messrs. Wm. Clowes and Sons, Ltd., London, E.C.

whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or elsewhere in London. And so we the assurers are contented and do hereby promise and bind ourselves each one for his own part, our heirs, executors and goods to the assured . . . executors, administrators, and assigns for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by Ditto Joy after the rate of three pounds per cent.

In witness whereof, we the assurers have subscribed our names and sums assured in London.

Memorandum.—The assurers do hereby covenant, promise and oblidge themselves, their heirs, executors, and goods in case of loss happening (which God forbid) to satisfie and pay their severall sums of money herein assured, upon the abatement only of ten pounds per cent and no more, provided always that they pay their respective sums of money by them assured according to subscription within one month after . . . otherwise no abatement whatsoever to be made, but to pay their full sums according to each man's subscriptions, any use or custom to the contrary notwithstanding. Written the day above said:

£100 { I, John Berry, am content with this assurance which God preserve for one hundred pounds this 29th June, 1692, præmio recd.

(Here follow eleven other signatures, for £700 in all.)[1]

[1] Mr. Marsden has been so good as to inform me that in the records of the Admiralty Court he has discovered an English policy of 6 Decr. 1557 issued in London, covering the hull and the cargo of the *Ele* from Velis Maligo to Antwerp and twenty-four hours after arrival. Of the eleven names of underwriters only two are foreign and those are Italian. He has also found a policy in Italian, dated London, 20 Septr. 1547, the signatures and declarations of acceptance of risk at the end being in English. The risk in this case is on the ship *Santa Maria de Venetia* from the port or bay of Cadiz to London. A French policy which he has found, dated London, 8 Jan. 1565, seems to cover three French ships and cargoes from Havre to Sagres; of these, two were destroyed by the Portuguese and the remaining one was damaged by collision on her return to Havre: to this policy there are thirty-six underwriters. As Mr. Marsden is engaged in editing the records of the Admiralty Court for the Selden Society the texts of these policies will before long be accessible to the public. Meanwhile it is worth mentioning that he considers the policy of 1557 to be the earliest policy *in English* contained in the Admiralty records. As far as I am able to judge, that policy and the Italian one of 1547 are both based on Italian forms of earlier date and simpler content than that prescribed in the Florentine Ordinance of 1523.—G.

EXTRACT from "Select Pleas in the Court of Admiralty," edited for the Selden Society by R. G. Marsden, vol. ii. p. 49.[1]

De Salizar (*or Salazar*) c. *Blackman*

A.D. 1555. File 29, No. 45. Policy of assurance; the libel, *ibidem*, contains an allegation that the assurers are liable if they do not within two years, or one year, of the ship sailing certify or bring to the knowledge of the assured the goods assured.

In London the fyvthe of August 1555.

. . . Spanyard dwellinge in London dothe cause . . . to be assured in the name of Anthony de (Salizar of) Andwerp from any porte of the Isles of Indea of Calicut unto Lixborne in the ship called Sancta Crux whereof was capytayn and master Fernando and Peter de Lovona (?) upon all kinde of merchaundies whiche shall be laden in the same ship by the handes of Diego de Frias or Anthony Ferrera or other for them apperteynenge to Anthony de Salizar and Ventura de Fryas or to whom soever they shall appertayn. The adventure begeynethe from the ower that the said merchaundies or parte thereof shall begin to be laded in the said shippe untill the sayd shipp shall be arryved savely in Lixborn. And we bynde us to bere the adventure of the said merchaundies and the costes of the assurances. And we will that he shall not be bounde to bringe any billes of ladinge but onely the chardge of his othe. And so we are contented to bear this adventure. And we will that this assurans shall be so stronge and good as the most ample writinge of assurans whiche is used to be maid in the strete of London or in the burse of Andwerp or in any other forme that shulde have more force. And yf godes will be that the said shippe shall not well procede we promys to remyt yt to honest merchaunts and not to go to the lawe maid as aforesaid.

I Lewes de Paz am contented to bere the adventure in this assurance for the some of C^{li} money of Englond . . . . C^{li}

(In all 22 subscriptions, for sums varying from £100 to £10. The above and most of the others are crossed out. That of Blackman, one of the defendants in *De Salizar* c. *Blackman*, is as follows :—)

We John Blackman and John Watkins ar content to assure in maner and forme abovesaid the vjth of August 1555. } XXV^{li}

[1] Reproduced with the permission of the Council of the Selden Society and the approval of Mr. R. G. Marsden. This is the earliest policy in English yet discovered (1899).

APPENDIX Ca

THE

..... MARINE INSURANCE COMPANY, LIMITED

Ship.

19

This company provisionally insures on your account

Vessel

Voyage

Interest

Amount and premium £ @ per cent.

On receipt of the necessary particulars a stamped policy will be issued, and this slip cancelled.

Underwriter.

If upon the sailing being known the assured has not given instructions to put forward a policy, the company is authorised to do so.

Risk not to commence before expiration of previous policies.

Warranted free from capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, *piracy excepted*, and also from all consequences of riots, insurrections, hostilities, or warlike operations, whether before or after declaration of war.

Conditions —No thirds off. Collision, Deviation and Docking Clauses, F.G.A. Y/A.

APPENDIX Cb

THE

.....MARINE INSURANCE COMPANY, LIMITED

Cargo and Freight.

19

M

This company provisionally insures on your account

Vessel

Voyage

Interest

Amount and Premium £ @ per cent.

On receipt of the necessary particulars a stamped policy will be issued, and this slip cancelled.

Underwriter.

Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, *piracy excepted*, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Conditions.—Average as customary. Free of particular average, unless stranded, sunk, or burnt. F.G.A. and Y/A Rules. Deviation Clause.

APPENDIX D

THE

.....MARINE INSURANCE

COMPANY, LIMITED

LIVERPOOL, 19

Quotation

Subject to acceptance by
and no risk until confirmed by us.

DEAR SIR—In reply to your inquiry of the
beg to inform you that our present rate on per
at and from

per cent.

(Usual clauses, including F.C. & S.)
I am, dear sir, yours faithfully,

Underwriter.

APPENDIX E

TENDER OF ABANDONMENT[1]

To the underwriters of
the ship " " (or steamship " ").

Information having reached us that the has been wrecked (or sunk, or burnt, or lost by stranding or collision, etc.), at , we hereby abandon to you our interest in the above vessel, and claim from you payment of total loss in respect of the sum of £ insured with you.

To the underwriters of the cargo
(or freight) of the ship " " (or steamship " ").

Information having reached us that the ship " " has been wrecked (or sunk, or burnt, or lost by stranding, or collision, etc.), at , we hereby abandon to you our interest in the goods shipped in above vessel as noted below and insured with you, and we claim from you payment of total loss in respect of £ insured with you on these goods.

[1] See also Owen's *Notes and Clauses*, pp. 196, 198, 221.

APPENDIX F

SHIP FOR VOYAGE.

£

The risk not to commence before the expiration of the previous policies.

General average recoverable according to foreign statement if so claimed or according to York-Antwerp rules, or per York-Antwerp rules, 1890, if in accordance with the contract of affreightment.

With leave to dock, undock, and to go in and out of graving-dock and on to gridiron as often as required without prejudice to this insurance.

In the event of the vessel making any deviation or change of voyage it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

FULL PROTECTION.

Whereas it hath been proposed to the.....Marine Insurance Company, Limited (hereinafter called the company), by

as well in own name as for and in the name and names of all and every other person or persons to whom the ship insured by this policy does, may, or shall appertain in part or in all to make with the company the insurance hereinafter mentioned and described. Now this policy witnesseth that in consideration of the said person or persons effecting this policy promising to pay to the company the sum of

as a premium at and after the rate of
per cent for such insurance the company takes upon itself the burthen of such insurance to the amount of

and promises and agrees with the insured, their executors, administrators, and assigns, in all respects truly to perform and fulfil the contract contained in this policy. And it is hereby agreed and declared that the said insurance shall be and is an insurance (lost or not lost) at and from

upon the body, tackle, apparel, ordnance, munition, artillery, boats and furniture of and in the ship or vessel called the

(hereinafter called the insured ship) and against the liabilities hereinafter mentioned.

And it is also agreed and declared that the insured ship as between the insured and the company so far as concerns this policy shall be and is valued at £

Warranties applicable to insurance on ship :—

Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, *piracy excepted*, and also from all consequences of riots, insurrections, hostilities, or warlike operations, whether before or after declaration of war.

AND SO FAR AS CONCERNS THE INSURANCE UPON THE INSURED SHIP the company promises and agrees as follows: that is to say—

That the insurance aforesaid shall commence upon the insured ship at and from as above and shall continue until she has moored at anchor in good safety at her abovementioned place of destination, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage, whichever may first occur. And that it shall be lawful for the insured ship on the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports and places whatsoever without prejudice to this insurance. And touching the adventures and perils which the company is contented to bear and does take upon itself in the voyage so insured as aforesaid, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mark and countermark, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master and mariners and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the insured ship or any part thereof. And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the insured ship or any part thereof without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured, and it is expressly declared and agreed that the acts of insurer or insured in recovering, saving, or preserving, the property insured shall not be considered a waiver or acceptance of abandonment.

That the insured ship shall be and is warranted free from average under £3 per centum unless general, or the insured ship be stranded, sunk, or burnt, and warranted free from particular average below the load water line unless occasioned by fire or contact with some substance other than water.

That the company will pay without any deduction the net cost of repairing damages recoverable under this policy when the damage has been sustained before the expiration of eighteen months from the date of the builder's certificate in the case of ships built in the United Kingdom, or of twelve months from the same date (or date of launching where no builder's certificate has been given) in the case of all other vessels. After these periods the usual deductions of new for old will be made whether the vessel shall be on her first voyage or not.

Warranties applicable to Insurance against Liabilities.

AND SO FAR AS CONCERNS THE AFORESAID INSURANCE AGAINST LIABILITIES the company promises and agrees as follows: that is to say—

That the company will protect and indemnify the insured against any such liabilities incurred by him or them (without his or their actual fault or privity) at any time while the ship is insured by this policy as aforementioned, in respect of his or their ownership of or other interest in the insured ship or in respect of any contract for the carriage of any goods or passengers in the insured ship, for any losses, claims, demands, damages, or expenses which may arise from or in consequence of

(1) Any loss of life or injury to any person whomsoever or any life salvage.

(2) Any loss of or damage to any other ship or boat or any goods, merchandise or other things whatsoever on board any other ship or boat.

(3) Any damage done to any harbour, dock, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or moveable thing whatsoever, or to any goods or property being thereon.

(4) Any loss or damage of or to any goods, merchandise, or other things whatsoever, whether on board the said ship or not, which may arise from any unauthorised deviation of the said ship, or from any improper navigation of that or any other ship or boat. But this is not to include any loss or damage which may arise proximately or otherwise from improper stowage or by any emanation from or action of any part of the cargo or any previous cargo, or from any uncleanliness of the ship when loading, or from any want of proper ventilation.

(5) Any attempted or actual raising, removal, or destruction of the wreck of the said ship or the cargo thereof, or any neglect or failure to raise, remove, or destroy the same, but deducting the value of

any salvage, wreck, or cargo which may be recovered by the insured, or which may be available for or chargeable with such claims or expenses.

(6) The costs and expenses incurred by the insured in resisting any claims covered by this policy, or in any legal proceedings in relation to any such claims, provided such costs or expenses shall have been incurred with the consent in writing of the company.

Provided always that the insured shall not be entitled to protection or indemnity against any liabilities (except a liability for costs incurred as hereinbefore mentioned) which arising on or out of one and the same occasion do not altogether amount to £10 or upwards, nor to any protection or indemnity in respect of loss or damage due to improper stowage.

And provided further that if the insured or any of them shall in any case be entitled, or would but for any contract or undertaking be entitled, to limit their or his liability in respect of all or any of the said losses, claims, demands, damages, or expenses, then the company shall not be bound to protect or indemnify them or him to any greater extent than they or he would be entitled to if their or his liability were so limited, together with proper interest and costs. And that in no case shall the aggregate amount of the indemnity to be made or contributed to by the company in respect of any one occasion exceed in all (including interest and costs) £30 per ton on the gross tonnage of the insured ship.

Provided also that if the amount hereby insured be less than the amount at which the ship is valued in this policy, the amount in which the company by this policy undertakes to protect and indemnify the insured against liabilities as aforesaid, shall be limited to that proportion thereof which the sum hereby insured bears to the said value.

And it is hereby expressly agreed and declared that all warranties, conditions, and terms which would be implied in a policy on a ship alone shall apply to and be implied in the insurance by this policy on the insured ship, but shall not in any way apply to or be implied in the insurance by this policy against the aforementioned liabilities.

In witness whereof the undersigned on behalf of the said company according to the articles of association of the said company, and a resolution duly passed by the Board of Directors, have hereunto set their hands in Liverpool the day of 19

Examined DIRECTOR.

Countersigned

SECRETARY.

APPENDIX G

YORK-ANTWERP RULES

Association for the Reform and Codification of the Law of Nations

Liverpool Conference, 1890

Rule I.—Jettison of Deck Cargo

No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II.—Damage by Jettison and Sacrifice for the Common Safety

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—Extinguishing Fire on Shipboard

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—Cutting away Wreck

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average.

Rule V.—Voluntary Stranding

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—Carrying Press of Sail—Damage to or Loss of Sails

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground, or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail shall be made good as general average.

Rule VII.—Damage to Engines in Refloating a Ship

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII.—Expenses Lightening a Ship when Ashore, and Consequent Damage

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX.—Cargo, Ship's Materials, and Stores burnt for Fuel

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Rule X.—Expenses at Port of Refuge, etc.

(*a*) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(*b*) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety, or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(*d*) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and Maintenance of Crew in Port of Refuge, etc.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII.—Damage to Cargo in Discharging, etc.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII.—Deductions from Cost of Repairs

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of iron or steel ships, from date of original register to the date of accident:

Up to 1 year old (A)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B)	One-third to be deducted off repairs to and renewal of woodwork of hull, masts, and spars, furniture, upholstery, crockery, metal and glass ware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, wire ropes, and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.
Between 3 & 6 years (C)	Deductions as above under clause B, except that one-sixth be deducted off ironwork of masts and spars and machinery (inclusive of boilers and their mountings).
Between 6 & 10 years (D)	Deductions as above under clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
Between 10 & 15 years (E)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

Generally (G) — The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of wooden or composite ships :—

When a ship is under one year old from date of original register at the time of accident no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions :—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of ships generally :—

In the case of all ships, the expense of straightening bent iron-work, including labour of taking out and replacing it, shall be allowed in full.

Graving-dock dues, including expenses of removals, cartages, use of shears, stages, and graving-dock materials, shall be allowed in full.

Rule XIV.—Temporary Repairs

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV.—Loss of Freight

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule XVI.—Amount to be made good for Cargo lost or damaged by Sacrifice

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the

goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII.—Contributary Values

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed ; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average ; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects not shipped under bill of lading shall not contribute to general average.

Rule XVIII.—Adjustment

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

APPENDIX H

THE FOLLOWING ARE THE RULES OF PRACTICE

Adopted by the Association of Average Adjusters up to May 1909

Note.—Some of the under-mentioned rules are, as indicated, "Customs of Lloyd's," now by resolution of the Association incorporated amongst the Rules of Practice. The history of the collection of the "Customs of Lloyd's" by a Special Committee of the Association, and of their final incorporation as stated, appears in the Annual Reports of the Association. The following is an Index of the references to the "Customs" in the said Reports, viz.:—

THE "CUSTOMS OF LLOYD'S"

Appointment of a Committee to collect . .	1873, p. 20
Report of Committee, considered . . .	1874, p. 23
Do. further considered . .	1875, p. 22 and 1876, p. 12
Resolution—"That the Report on the 'Customs of Lloyd's' as now amended be adopted, and reprinted for the use of the Association"	1876, p. 21

The preamble to the Customs was—

> "Nothing can be called a 'Custom of Lloyd's' which is determined by a decision of the superior Courts; for whatever is thus sanctioned rests on a ground surer than Custom. A 'Custom of Lloyd's' then must relate to a point on which the law is doubtful, or not yet defined, but as to which, for practical convenience, it is necessary that there should be some uniform rule. By the term is here understood the Customs of

English Adjusting, whether as affecting General or Particular Average."

Resolution—"That the 'Customs of Lloyd's,' after having been sanctioned by a two-thirds vote of the Association, shall be deemed to have the same force as a Rule of the Association" . . . . . 1877, p. 79 and 1878, p. 18

Resolution—"That the 'Customs of Lloyd's,' as collected by this Association, be now confirmed" . . . . . 1879, p. 21

Proposed—"That it be left to the Committee of Management to consider the 'Customs of Lloyd's' as adopted by the Association as Rules of Practice, and to delete such rules, or parts of rules, as have been affected by legal decisions, and to report to the next General Meeting" . . 1889, p. 49

Report of the Committee accepted . . . 1890, p. 33

Adoption of alterations recommended by Committee . . . . . 1890, p. 35 and 1891, pp. 32-34

1. *Adjustments "For the Consideration of Underwriters"*

(Proposed and Accepted 1894, p. 32. Confirmed 1895, p. 25)

That any adjustment prepared for the consideration of underwriters shall include a statement of the reasons of the average adjuster for making such adjustment, and, when submitted in conjunction with a claim for which underwriters are liable, shall be contained in an entirely separate document. To such adjustments the following note shall be appended, viz. :—

"This adjustment has been prepared by request, to enable the assured to submit the case to underwriters."

Vide "**Rules Rescinded**," p. 356 *infra*.

2. *Interest and Commission for Advancing Funds*

(Proposed and Accepted 1906, p. 21. Confirmed 1907, p. 60)

That, in practice, interest and commission for advancing funds are only allowable in average when, proper and necessary steps having been taken to make a collection on account, an out-of-pocket expense for interest and/or commission for advancing funds is reasonably incurred.

3. *Agency Commission and Agency*

(Proposed and Accepted 1906, p. 21. Confirmed 1907, p. 60)

That, in practice, neither commission (excepting bank commission) nor any charge by way of agency or remuneration for trouble is allowed to the shipowner in average, except in respect of services rendered on behalf of cargo when such services are not involved in the contract of affreightment.

4. *Duty of Adjusters in respect of Cost of Repairs*

(Proposed and Accepted 1879, p. 24. Confirmed 1880, p. 21)

That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent shipowner would have taken if uninsured.

5. *Claims for Damage to Ship's Machinery*

(Proposed and Accepted 1880, p. 31. Confirmed 1881, p. 27)

That no claim for damage to ship's machinery shall be admitted into an adjustment unless a survey has been held upon such machinery by competent and disinterested engineers as soon as practicable after the occurrence of the casualty giving rise to the claim ; a certificate of such survey, reporting as to the nature and cause of the damage, to be furnished to the adjuster : or unless clear proof be given to the adjuster that the holding of such survey or the obtaining of such certificate is impracticable, which proof is to be set forth on the face of the adjustment.

6. *Claims on Ship's Machinery*

(Proposed and Accepted 1890, p. 32. Confirmed 1891, p. 32)

That in all claims on ship's machinery for repairs, no claim for a new propeller or new shaft shall be admitted into an adjustment, unless the adjuster shall obtain and insert into his statement evidence showing what has become of the old propeller or shaft.

7. *Water Casks* (*Custom of Lloyd's*, 1876)

Water casks or tanks carried on a ship's deck are not paid for by underwriters as general or particular average ; nor are warps or other articles when improperly carried on deck.

GENERAL AVERAGE—

8. *Basis of Adjustment*

(Proposed and Accepted 1889, p. 60. Confirmed 1890, p. 33)
(Addition proposed and accepted, 1899, p. 29. Confirmed 1900, p. 20)

That in any adjustment of general average not made in accord

ance with British law, it shall be prefaced on what principle or according to what law the adjustment has been made, and the reason for so adjusting the claim shall be set forth.

In all cases the adjuster shall give particulars in a prominent position in the average statement of the clause or clauses contained in the charter-party and/or bills of lading with reference to the adjustment of general average.

9. *Deckload Jettison* (*Custom of Lloyd's, Amended* 1890–91)

The jettison of a deckload carried according to the usage of trade, and not in violation of the contracts of affreightment, is general average.

There is an exception to this rule in the case of cargoes of cotton, tallow, acids, and some other goods.

In lieu of—(*Custom of Lloyd's*, 1876)

The general rule of law now is, that the jettison of a deckload, carried by consent of the shipper, is general average, as between the parties who have assented to this mode of stowage. The exceptions are, those trades in which there is a custom that the jettison shall be at the risk of the shipper or owner of the deckload.

Such customs may, perhaps, though not very correctly, be called "Customs of Lloyd's."

This custom exists with cargoes of cotton, tallow, acids, and some other goods.

10. *Damage by Water used to extinguish Fire*

(Proposed and Accepted 1873, p. 20. Confirmed 1874, p. 18)

That damage done by water poured down a ship's hold to extinguish a fire be treated as general average.

11. *Damage caused by Water thrown upon Burning Goods*

(Proposed and Accepted 1874, p. 23. Confirmed 1875, p. 22)

That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them.

12. *Voluntary Stranding* (*Custom of Lloyd's*, 1876)

The Custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding.

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

13. *Expenses lightening a Ship when Ashore* (*Custom of Lloyd's as amended* 1890–91)

When a ship is ashore, and, in order to float her, cargo is put into lighters and is then at once re-shipped, the whole cost of lightering, including lighter hire and re-shipping, is general average.

In lieu of the following, formerly succeeding Section (*f*) *in "Expenses at Port of Refuge"*

The above rules do not apply to the cost of lightening a ship when ashore, in case the cargo is put into lighters in order to float the ship, and is then at once re-shipped. In such cases, the whole cost of lightening, including that of re-shipping, is general average.

14. *Sails set to force a Ship off the Ground* (*Custom of Lloyd's*, 1876)

Sails damaged by being set, or kept set, to force a ship off the ground, or to drive her higher up the ground for the common safety, are general average.

15. *Stranded Vessels. Damage to Engines in getting off*

(Proposed and Accepted 1890, p. 64. Confirmed 1891, p. 35)
(Amended 1906, p. 15. Confirmed 1907, p. 46)

That damage caused to machinery and boilers of a stranded vessel, in endeavouring to refloat for the common safety, when the interests are in peril, be allowed in general average.

16. *Claims arising out of Deficiency of Fuel*

(Proposed and Accepted 1899, p. 50. Confirmed 1900, p. 25)

That in adjusting general average arising out of deficiency of fuel, the facts on which the general average is based shall be set forth in the adjustment, including the material dates and distances, and particulars of fuel supplies and consumption.

17. *Resort to Port of Refuge for General Average Repairs: Treatment of the Charges incurred*

(Proposed and Accepted 1888, p. 45. Confirmed 1889, p. 48)

That when a ship puts into a port of refuge in consequence of

damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average; and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Attwood* v. *Sellar*.)

18. *Resort to Port of Refuge on account of Particular Average Repairs: Treatment of the Charges incurred*

(Proposed and Accepted 1888, p. 47. Confirmed 1889, p. 49)

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See *Svendsen* v. *Wallace*.)

19. *Treatment of Costs of Storage and Reloading at Port of Refuge*

(Proposed and Accepted 1886, p. 37. Confirmed 1887, p. 36)

That when the cargo is discharged for the purpose of repairing, re-conditioning, or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.

20. *Expenses at a Port of Refuge* (*Custom of Lloyd's, Amended* 1890–91)

When a ship puts into a port of refuge on account of accident, and not in consequence of damage which is itself the subject of general average, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

(*a*) All cost of towage, pilotage, harbour dues, and other extra-
1876 ordinary expenses incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term "extraordinary expenses" are not included wages or victuals of crew, coals, or engine stores, or demurrage.

(*b*) The cost of discharging the cargo, whether for the common
1876 safety, or to repair the ship, together with the cost of conveying it to the warehouse, is general average.

The cost of discharging the cargo on account of damage to it resulting from its own *vice propre*, is chargeable to the owners of the cargo.

(*c*) The warehouse rent, or other expenses which take the 1876 place of warehouse rent, of the cargo when so discharged, is, except as under, a special charge on the cargo.

(*d*) The cost of reloading the cargo, and the outward port 1876 charges incurred through leaving the port of refuge, are, when the discharge of cargo falls in general average, a special charge on freight.

(*e*) The expenses referred to in clause (*d*) are charged to the party 1876 who runs the risk of freight; that is, wholly to the charterer, if the whole freight has been prepaid; and if part only, then in the proportion which the part prepaid bears to the whole freight.

(*f*) When the cargo, instead of being sent ashore, is placed on board hulk or lighters during the ship's stay in port, the hulk-hire is divided between general average, cargo, and freight, in such proportions as may place the several contributing interests in nearly the same relative positions as if the cargo had been landed and stored.

The amendment is in the preamble, which formerly read thus:—

When a ship puts into a port of refuge on account of accident or sacrifice, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

21. *Treatment of Costs of Extraordinary Discharge*

(Proposed and Accepted 1886, p. 37. Confirmed 1887, p. 36)

That no distinction be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.

22. *Towage from a Port of Refuge*

(Proposed and Accepted 1876, p. 26. Confirmed 1877, p. 54)

That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port; then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

23. *Cargo forwarded from a Port of Refuge*

(Proposed and Accepted 1876, p. 26. Confirmed 1877, p. 34)

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded; then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

24. *Cargo sold at a Port of Refuge*

(Proposed and Accepted 1902, p. 34. Confirmed 1903, p. 18)

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, or such portion of it as is fit to be carried on, but, in order to save expense, the cargo, or a portion of it, be, with the consent of the owners of such cargo, sold at the port of refuge, then the loss by sale, including loss of freight on cargo so sold (up to the amount of expense saved), shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure: provided always that the amount so divided shall in no case exceed the cost of transhipment and/or forwarding referred to in the preceding rule of the Association.

25. *Interpretation of the Rule respecting Substituted Expenses*

(Proposed and Accepted 1877, p. 63. Confirmed 1878, p. 18)

That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.

26. *Damage caused to Cargo during Forced Discharge*

(Proposed and Accepted 1883, p. 58. Confirmed 1884, p. 37)

That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.

Vide "**Rules Rescinded,**" p. 356 *infra.*

27. *Treatment of Damage to Cargo caused by Discharge, Storing, and Reloading*

(Proposed and Accepted 1886, p. 37. Confirmed 1887, p. 36)

The damage necessarily done to cargo by discharging, storing, and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated.

28. *Deductions from Cost of Repairs to Iron Vessels in adjusting General Average*

(Proposed and Accepted 1887, p. 36. Confirmed 1888, p. 28)

(*Referred to Special Committee*, 1884, p. 45—*Reports, Prov.*, 1885, p. 19, *Final*, 1886, p. 16)

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz :—

From Date of Original Register.

Up to 1 year old (A)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B)	One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connections; other repairs in full.
Between 3 & 6 years (C)	Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.
Between 6 & 10 years (D)	Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets and rigging; one-sixth to be deducted off chains and cables.
After 10 years (E)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

Generally (F)

The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

29. *Freight Sacrificed: Amount to be made good in General Average*

(Proposed and Accepted 1894, p. 56. Confirmed 1895, p. 29)

That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

30. *Basis of Contribution to General Average*

(Original Rule of Practice, 1873)

When property saved by a general average act is injured or destroyed by subsequent accident, the contributing value of that property to a general average which is less than the total contributing value shall, when it does not reach the port of destination, be its actual net proceeds; when it does, it shall be its actual net value at the port of destination, on its delivery there; and in all cases any values allowed in general average shall be added to and form part of the contributing value as above.

The above rule shall not apply to adjustments made before the adventure has terminated.

31. *Contributory Value of Ship*

(Proposed and Accepted 1899, p. 41. Confirmed 1900, p. 20)

That in any adjustment of general average there shall be set forth the certificate on which the contributory value of the ship is based, or if there be no such certificate, the information adopted in lieu thereof, and any amount made good shall be specified.

32. *Contributory Value of Freight*

(Original Rule of Practice, 1873)

That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and

no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date.

(Proposed and Accepted 1899, p. 48. Confirmed 1900, p. 24)

That in any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the port charges and wages deducted, and any amount made good.

33. *Vessel in Ballast and under Charter: Contributing Interests*

(Proposed and Accepted 1896, p. 63. Confirmed 1897, p. 34)

That when a vessel is in ballast and under charter, the interests contributing to expenses or sacrifices incurred for the common safety are, in practice, the ship and the freight she is earning under the charter, computed as usual in the adjustment of general average, unless the expenses are salvage expenses specifically charged by a Court of Law or by arbitration to the vessel without any regard to the freight.

34. *Chartered Freight (ulterior): Contribution to General Average*

(Proposed and Accepted 1891, p. 35. Confirmed 1892, p. 27)

That when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average.

35. *Deductions from Freight at Charterer's Risk*

(Original Rule of Practice, 1873)

That freight at the risk of the charterer shall be subject to no deduction for wages and port charges, except in the case of charters in which the wages or port charges are payable by the charterer, in which case such freight shall be governed by the same rule as freight at the risk of the shipowner.

36. *Forwarding Charges on Advanced Freight*

(Original Rule of Practice, 1873)

That in case of wreck, the cargo being forwarded to its destination, the charterer, who has paid a lump sum on account of freight, which is not to be returned in the event of the vessel being lost, shall not be liable for any portion of the forwarding freight and charges, when the same are less than the balance of freight payable

to the shipowner at the port of destination under the original charter-party.

37. *Adjustment: Policies of Insurance and Names of Underwriters*

(Proposed and Accepted 1889, p. 60. Confirmed 1890, p. 33)

That no statement shall be drawn up showing the amount of payments by or to the underwriters, excluding statements of particular average on ship now dealt with by rule of the Association, unless the policies, or copies of policies of insurance, or certificates of insurance, for which the statement is required, be produced to the adjusters; and that such statement shall give the names of the underwriting firms and companies interested, and the amounts due on the respective policies produced.

38. *Sacrifice for the Common Safety: Direct Liability of Underwriters*

(Proposed and Accepted 1890, p. 42. Confirmed 1891, p. 34)

That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss, not being particular average, is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average.

39. *Enforcement of General Average Lien by Shipowners*

(Proposed and Accepted 1890, p. 56. Confirmed 1891, p. 34)

That in all cases where general average damage to ship is claimed direct from the underwriters on that interest, the average adjusters shall ascertain whether the shipowners have taken the necessary steps to enforce their lien for general average on the cargo, and shall insert in the average statement a note giving the result of their inquiries.

40. *Underwriter's Liability* (*Custom of Lloyd's*, 1876)

If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the

contributory value of the ship, that must be deducted from the insured value to find upon what the underwriter contributes.

This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured.

41. *The Duty of Adjusters in Cases involving Refunds of General Average Deposits or Apportionment of Salvage, Collision Recoveries, or other Funds*

(Proposed and Accepted 1896, p. 50. Confirmed 1897, p. 34)

That in cases of general average where deposits have been collected, and it is likely that repayments will have to be made, measures be taken by the adjuster to ascertain the names of underwriters who have reimbursed their assured in respect of such deposits; that the names of any such underwriters be set forth in the adjustment as claimants of refund, if any, to which they are apparently entitled; and that on completion of the adjustment, notice be sent to all underwriters whose names are so set forth as to any refund of which they appear as claimants and as to the steps to be taken in order to obtain payment of the same.

That in cases where the names of any underwriters are not to be ascertained on completion of the adjustment, notice be sent to the Secretary of Lloyd's, to the Institute of London Underwriters, to the Liverpool Underwriters' Association, and to the Association of Underwriters of Glasgow, notifying such interests as have not been appropriated to underwriters.

And that in cases of apportionment of salvage or other funds for distribution, similar measures be taken by the adjuster to safeguard the interests of any underwriters who may be entitled to benefit under the apportionment.

42. "*Memorandum*" *to Statements showing Refunds in respect of General Average Deposits*

(Proposed and Accepted 1904, p. 50. Confirmed 1905, p. 36)

That the following memorandum shall appear at the end of statements which show refunds to be due in respect of general average deposits, viz. :—

"MEMORANDUM.—Refunds shown in this statement should only be paid in exchange for the 'original' deposit receipts; or, in the event of their non-production, adequate indemnities must be obtained."

YORK-ANTWERP RULES—

43. *Modification of York-Antwerp Rules in Contracts of Affreightment: Liability of Underwriters*

(Proposed and Accepted 1904, p. 44. Confirmed 1905, p. 32)

That in all cases where the contract of affreightment provides for the application of York-Antwerp Rules in any modified or mutilated form, and when the policies of insurance provide for the application of York-Antwerp Rules, if in accordance with the contract of affreightment, in applying the claim to such policies no effect shall be given to York-Antwerp Rules.

44. *Allowance to be made in General Average under York-Antwerp Rules in respect of the Cost of Maintenance of Officers and Crew*

(Proposed and Accepted 1896, p. 47. Confirmed 1897, p. 33)

That the amount to be allowed in general average under York-Antwerp Rules for the maintenance of officers and crew shall be the actual cost of such maintenance where proved; but where proof of actual cost is not furnished to the adjuster, the allowance shall be determined by the under-mentioned scale; provided that where evidence of cost is produced, but is not conclusive, the allowance shall represent as nearly as possible the actual cost, but shall not exceed the under-mentioned scale, viz. :—

	OFFICERS[1] per man per day.	CREW[2] per man per day.
Passenger Steamers (Liners) . .	4s. 0d.	1s. 3d.
Passenger Sailing Vessels . .	3s. 0d.	1s. 3d.
Cargo Steamers and Sailing Vessels	2s. 6d.	1s. 3d.

except that the allowance for LASCARS shall be 9d. per man per day, and in the case of other Asiatic (native) crews shall be determined by the circumstances of each case.

[1] To include the master, deck officers, and engineers (in the case of a steamer), also the doctor and purser (if carried).
[2] To include the remainder of the ship's company.

PARTICULAR AVERAGE ON SHIP—

45. *Statement of Particular Average on Ships*

(Proposed and Accepted 1874, p. 23. Confirmed 1875, p. 19)

That claims for particular average on ships shall not be stated unless the policies or copies of policies of insurance, for claiming on which the statement is required, be produced to the adjusters.

(Proposed and Accepted 1874, p. 23. Confirmed 1875, p. 19)

That such statements shall give the names of the underwriting firms and companies interested, and the amounts payable on the respective policies produced.

46. *Apportionment of Costs in Collision Cases*

(Proposed and Accepted 1889, p. 42. Confirmed 1890, p. 30)
(*Referred to a Special Committee* 1888, p. 38)

That when a vessel sustains and does damage by collision, and litigation consequently results for the purpose of testing liability, the technicality of the vessel having been plaintiff or defendant in the litigation shall not necessarily govern the apportionment of the costs of such litigation, which shall be apportioned between claim and counterclaim in proportion to the amount which has been or would have been allowed in respect of each in the event of the claim or counterclaim being established; provided that when a claim or counterclaim is made solely for the purpose of defence, and is not allowed, the costs apportioned thereto shall be treated as costs of defence.

47. *Expenses of Removing a Vessel for Repair*

(Proposed and Accepted 1896, p. 23. Confirmed 1897, p. 24)

Where a vessel is in need of repair at any port, and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently :—

(*a*) The necessary expenses incurred in moving the vessel to the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in so returning shall also be allowed.

(*b*) Where by moving the vessel to the port of repair any new freight is earned, or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving her, and where the vessel loads a new cargo at the port of repair no expenses subsequent to the completion of repair shall be allowed.

The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew and/or runners, pilotage, towage, extra marine insurance, port charges, and, in case of a steamer, coal and engine-room stores.

(*c*) This rule shall not admit any ordinary expenses incurred

in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

48. *Coals and Stores used in Repair of Damage to the Hull*

(Proposed and Accepted 1876, p. 23. Confirmed 1877, p. 53)

That the cost of replacing coals and engine-room stores consumed either in the repair of damage to a steamer, in working the engines or winches to assist in the repairs of damage, or in moving her to a place of repair within the limits of the port where she is lying, shall be charged to the underwriters on ship as particular average.

49. *Rigging Chafed* (*Custom of Lloyd's*, 1876)

Rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact; or by displacement, through sea peril, of the spars, channels, bulwarks, or rails.

50. *Sails split or blown away* (*Custom of Lloyd's*, 1876)

Sails split by the wind, or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

51. *Scraping and Painting*

(Proposed and Accepted 1900, p. 26. Confirmed 1901, p. 41)

That when in consequence of damage by a peril insured against, a vessel's bottom has to be scraped and painted, the cost of such scraping and painting shall be charged to underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

52. *Dry Dock Expenses*

That where repairs on owner's account which are immediately necessary for the purpose of making the vessel seaworthy, and which can only be effected in dry dock, are executed concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

53. *Deduction of one-third* (*Custom of Lloyd's, amended* 1890–91)

(1876) The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions :—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving dock expenses and removals, cartages, use of shears, stages, and graving dock materials.

It does not apply to a ship's first voyage.

(1890-91) N.B.—Articles belonging to, or repairs done to, a ship, other than an iron ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

In lieu of note to Custom of Lloyd's, 1876, *viz.* :—

N.B.—Articles belonging to, or repairs done to, a ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

PARTICULAR AVERAGE ON GOODS—

54. *Adjustment on Bonded Prices* (*Custom of Lloyd's*, 1876)

In the following cases it is customary to adjust particular average on a comparison of bonded instead of duty paid prices :—

In claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

55. *Adjustment of Average on Goods sold in Bond*

(Proposed and Accepted 1885, p. 64. Confirmed 1886, p. 24)

That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term "Gross Proceeds" shall, for the purpose of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive

of Customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond.

56. *Apportionment of Insured Value of Goods*

(Proposed and Accepted 1885, p. 43. Confirmed 1886, p. 23)

That where different qualities or descriptions of cargo are valued in the policy at a lump sum, such sum shall, for the purpose of adjusting claims, be apportioned on the invoice values, where the invoice distinguishes the separate values of the said different qualities or descriptions; and over the net arrived sound values in all other cases.

57. *Under-insured Interest made good in General Average*

(Proposed and Accepted 1882, p. 47. Confirmed 1883, p. 48)

That an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect to such loss, although the amount so recovered may exceed the amount paid by him.

58. *Allowance for Water in Picked Cotton* (*Custom of Lloyd's*, 1876)

When bales of cotton are picked, and the pickings are sold wet, the allowance for water in the pickings (where there are no means of ascertaining it) is by custom fixed at one-third.

59. *Allowance for Water in Cut Tobacco* (*Custom of Lloyd's*, 1876)

When damaged tobacco is cut off, the allowance for water in the cuttings is one-fourth.

60. *Allowance for Water in Wool* (*Custom of Lloyd's*, 1876)

Damaged wool from Australia, New Zealand, and the Cape is subject to a deduction of 3 per cent for wet, if the actual increase cannot be ascertained.

61. *Franchise Charges* (*Custom of Lloyd's*, 1876)

The expenses of protest, survey, and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them.

62. *Extra Charges* (*Custom of Lloyd's*, 1876)

Extra charges payable by underwriters, when incurred at the port of destination, are recovered in full; but when charges of the same nature are incurred at an intermediate port they are subjected to the same treatment, in respect of insured and contributory values, as general average charges.

63. *Adjustment of Return of Premium* (*Custom of Lloyd's*, 1876)

When the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured to arrive at the amount on which the return is taken.

RULES RESCINDED—

Underwriters' Liability in respect of Jettison

(Proposed and Accepted 1874, p. 20. Confirmed 1875, p. 20)

(Rescinded 10th May 1889)

That the direct liability of an underwriter on goods for the value of goods insured by him which have been jettisoned or sacrificed for the common safety, or of an underwriter on ship for ship's materials sacrificed for the common safety, be treated as particular average.

Damage to Cargo in Discharging (*Custom of Lloyd's*)

(Rescinded 1890, p. 35; 1891, p. 33)

Damage done to cargo by discharging it at a port of refuge, in the manner and under the circumstances customary at that port, is not allowed as general average.

This rule does not apply to damage done in lightening a ship which is ashore.

Adjustments "For the Consideration of Underwriters"

(Rescinded 1894, p. 32; 1895, p. 25)

That no adjustment "For consideration of the underwriters" shall be made, unless it contain a statement of the reasons of the average adjuster for making such adjustment.

Agency Fees chargeable by Shipowners

(Rescinded 1906, p. 21; 1907, p. 46)

That neither interest nor commission (excepting bank commission) nor any other charge by way of agency or remuneration for trouble,

is allowed to the shipowner in general average or particular average on ship, or as a special charge in respect of payments made or services rendered at the port at which the managing owner for the time being resides; excepting that a commission or agency fee is allowable in respect of payments made or services rendered on behalf of cargo, when such payments or services are not involved in the contract of affreightment.

PROBATIONARY ORDER—

The following was adopted as a Probationary Order, subject to confirmation at the Annual General Meeting in 1910, viz.:—

"That the Rules of Practice headed 'Contributory Value of Freight' and 'Deductions from Freight at Charterer's Risk,' be amended by the substitution therefor of the following, viz.:—

"*Contributory Value of Freight*

"*At Shipowner's Risk.*—Freight at the risk of the shipowner shall contribute to general average upon the gross amount earned, after deduction of those expenses necessarily incurred by him in respect of it which would not have been incurred had the freight been totally lost at the time of the general average act (such expenses not having been allowed in general average). The net amount made good shall also contribute to general average. The expenses to be deducted shall include fuel, consumable stores, provisions for the crew, so far as they are purchased and consumed after the general average act, and before the termination of the venture, port and canal charges, and crew's wages.

"*At Charterer's Risk.*—The contributory value of freight at the risk of the charterer payable at the termination of the venture is computed in the same manner, the expenses to be deducted being limited to such as are necessarily incurred by the charterer in respect of his freight after the time of the general average act.

"In any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the expenses deducted and any amount made good."

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APPENDIX I

INSTITUTE VOYAGE CLAUSES, 1909

HULLS

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured; and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would

have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew, not to be considered as part owners within the meaning of this clause, should they hold shares in the steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp rules, or, in the case of wood cargoes, York-Antwerp rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

Average payable on each valuation separately or on the whole without deduction of thirds, new for old, whether the average be particular or general.

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

Warranted free from particular average under 3 per cent, but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.

No claim shall in any case be allowed in respect of scraping or painting the vessel's bottom.

Grounding in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and

nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire ; and whenever the extent of the damage is ascertainable, the underwriters may take, or may require the assured to take, tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make an allowance at the rate of £30 per cent per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this clause, £15 per cent shall be deducted from the amount of the ascertained claim.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices.

With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

With leave to dock and undock and go into graving dock.

APPENDIX Ka

INSTITUTE TIME CLAUSES, 1909

HULLS

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay ; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured ; but in such cases the liability for the collision, or the amount payable for the services

rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp rules, or, in the case of wood cargoes, York-Antwerp rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

Donkey boilers, winches, cranes, windlasses, steering gear, and

electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

Warranted free from particular average under 3 per cent, but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.

No claim shall in any case be allowed in respect of scraping or painting the vessel's bottom.

Grounding in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar shall not be deemed to be a stranding.

The warranty and conditions as to average under 3 per cent to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, viz. : at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent above referred to, particular average occurring outside the period covered by this policy may be added to particular average occurring within such period, provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding policy.

In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters, where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the underwriters may take, or may require the assured to take, tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make an allowance at the rate of £30 per cent per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this clause, £15 per cent shall be deducted from the amount of the ascertained claim.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

To return { per cent for each uncommenced month if it be mutually agreed to cancel this policy. / as follows for each consecutive 30 days the vessel may be laid up in port, viz. :— per cent if in the United Kingdom not under average. / per cent under average, or if abroad. } and arrival.

APPENDIX Kb

INSTITUTE TIME CLAUSES, 1909

HULLS—F.P.A. ABSOLUTELY

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not

interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

This insurance also specially to cover loss of vessel through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp rules, or, in the case of wood cargoes, York-Antwerp rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

General average payable without deductions, new for old.

Refrigerating machinery and insulation not covered unless expressly included in this policy.

WARRANTED FREE FROM PARTICULAR AVERAGE ABSOLUTELY.

In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters, where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

To return { per cent for each uncommenced month if it be mutually agreed to cancel this policy. / per cent for each consecutive 30 days the vessel may be laid up in port. } and arrival.

APPENDIX Kc

INSTITUTE TIME CLAUSES, 1909

STEAMERS—FREE OF DAMAGE ABSOLUTELY

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not

interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

This insurance also specially to cover loss of vessel through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

Warranted free from all claim in respect of partial loss of and/or damage to the property hereby insured.

To cover the risk of total loss absolute or constructive.

General average and salvage (including contribution on amount made good) payable according to the law and practice obtaining at the place where the adventure ends as if the contract of affreightment contained no special terms upon the subject, or if the contract of affreightment so provides, according to York-Antwerp rules, or, in the case of wood cargoes, York-Antwerp rules omitting the first word of Rule I. ("No"), but excluding in every case all partial loss of and damage to the property hereby insured, together with expenses incidental thereto, whether included as general average or otherwise.

Refrigerating machinery and insulation not covered unless expressly included in this policy.

In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

To return { per cent for each uncommenced month if it be mutually agreed to cancel this policy. / per cent for each consecutive 30 days the vessel may be laid up in port. } and arrival.

APPENDIX Kd

INSTITUTE CLAUSES FOR BUILDERS' RISKS, 1909

Attached to policy per _____ *for £* _____ *dated* _____

This insurance is also to cover all risks, including fire, while under construction and/or fitting out, except in buildings or workshops, but including materials in yards and docks of the assured, or on quays, pontoons, craft, etc., and all risk while in transit to and from the works and/or the vessel wherever she may be lying, also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways.

This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks whilst proceeding to and returning from the trial course.

With leave to proceed to and from any wet or dry docks, harbours, ways, cradles, and pontoons during the currency of this policy.

In case of failure of launch, underwriters to bear all subsequent expenses incurred in completing launch.

Average payable irrespective of percentage, and without deduction of one-third, whether the average be particular or general.

General average and salvage charges as per foreign custom, payable as per foreign statement, and/or per York-Antwerp rules, if required; and in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by arbitration in the manner hereinafter provided for under "Collision Clause," and the amount so awarded, so far as applicable to the interest hereby insured, shall constitute a charge under this policy.

In event of deviation to be held covered at an additional premium to be hereafter arranged.

To cover while building all damage to hull, machinery, apparel, or furniture, caused by settling of the stocks, or failure or breakage

of shores, blocking, or staging, or of hoisting or other gear, either before or after launching, and while fitting out.

With leave to increase value.

It is also agreed that any changes of interest in the steamer hereby insured shall not affect the validity of this policy.

And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover loss of or damage to the hull or machinery, through negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, or from explosions, riots, or other causes of whatever nature, arising either on shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, and to cover all risks incidental to steam navigation, or in graving docks.

Collision Clause

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we, the assurers, will pay the assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured. And in cases where the liability of the ship has been contested, with the consent, in writing, of a majority of the underwriters on the hull and/or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross Liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners, all questions of responsibility and amount of liability as between the two ships being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators,

one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of underwriters interested in each vessel; the two arbitrators chosen to choose a third arbitrator before entering upon the reference. The terms of the Arbitration Act of 1889 to apply to such reference, and the decision of such single, or of any two of such three arbitrators, appointed as above, to be final and binding.

This clause shall also extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, or for loss of life or personal injury consequent on such collision.

Protection and Indemnity Clause

And we further agree that if the assured shall become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall incur any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the ship hereby insured, that is to say :—

Loss or damage in respect of any other ship or boat or in respect of any goods, merchandise, freight, or other things or interests whatsoever on board such other ship or boat caused proximately or otherwise by the ship insured, in so far as the same is not covered by the running-down clause hereto attached.

Loss of or damage to any goods, merchandise, freight, or other things or interests whatsoever other than as aforesaid, whether on board the said steamship or not, which may arise from any cause whatever.

Loss of or damage to any harbour, dock, graving or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or moveable thing whatsoever, or to any goods or property in or on the same, howsoever caused.

Any attempted or actual raising, removal, or destruction of the wreck of the said steamship or the cargo thereof, or any neglect or failure to raise, remove, or destroy the same.

Any sum or sums for which the assured may become liable or incur from causes not hereinbefore specified, but which are or have heretofore been absolutely or conditionally recoverable from or undertaken by the Liverpool and London Steamship Protection Association, Limited, and/or North of England Protecting and Indemnity Association, but excluding loss of life and personal injury.

We will pay the assured such proportion of such sum or sums so

paid, or which may be required to indemnify the assured for such loss, as our respective subscriptions bear to the policy value of the ship hereby insured, and in case the liability of the assured has been contested with the consent in writing of a majority of the underwriters on the ship hereby insured in amount, we will also pay a like proportion of the costs which the assured shall thereby incur or be compelled to pay.

APPENDIX L

1. LIVERPOOL SLIP WARRANTIES

(1) Warranted no British North America.
(2) Warranted not to be in the Baltic or White Sea between 1st October and 31st March, both days inclusive.
(3) Warranted not to sail with over net register tonnage of grain from any port in North America between 1st October and 31st March, both days inclusive.
(4) Warranted not to sail with over net register tonnage of ore, iron, or phosphate, to or from any port in North America between 1st September and 31st March, both days inclusive.
(5) Warranted no East of Singapore, excepting Java, Bangkok, or Saïgon.
(6) Warranted no Bilbao.
(7) Warranted no Straits of Magellan.

2. TIME WARRANTIES IN USE IN LONDON IN 1899

Warranted no British North America (*ex* Halifax for coaling).
Warranted no Baltic or White Sea, 1st October to 1st April.
Warranted no East of Singapore *ex* Java, Australia, Saïgon, and Bangkok.
21/ additional to cancel above warranties *ex* British North America, 1st September to 1st April (*in some cases*, *ex* British North America, *absolutely*).
In the case of fine highly valued steamers there are added after the exceptions to the East of Singapore warranty the words "and out and home voyages to China and Japan."

APPENDIX M

A Selection of Clauses in Ordinary Use in Policies on Interest other than Hull[1]

ARROWROOT.—Each 20 barrels or 50 tins. Each 50 barrels.

BLOCK POLICY: Adjustment of Premium on Amounts over or under declared.—The premium charged under this policy being based on an estimated value of £ of shipments during the period insured, the assured warrant that at the end of one year they will report to the company the actual value of all shipments covered hereunder, and should such shipments exceed the value of £ , the assured hereby agree to pay to the company additional premium at rate of per cent of value in excess of such sum of £ , and the company shall return premium at the same rate upon the deficiency if the aggregate amount of such shipments be less than £ .

BLUE CLOTHS—(*Pondicherry*).—Each bale.

BOTTLED GOODS (or LABEL CLAUSE).—Warranted free from all claim arising from loss of or damage to labels, unless the vessel be stranded, sunk, or burnt.

BOTTOMRY BOND.—To pay such proportion of the £ , as may not be recovered in consequence of the surety being destroyed or diminished in value by reason of the perils insured against, or of any subsequent bond or bonds.

CAMELS' WOOL.—Each 5 bales. Each 10 bales.

CATTLE.—(*a*) Against all risks, including mortality and jettison arising from any cause whatsoever. Animals walking ashore, or, when slung from the vessel, walking after being taken out of the slings, to be deemed arrived, and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance.

(*b*) Warranted free from mortality, unless caused by the

[1] Compiled from MS. collections, telegraph codes, office clauses, policies, etc., and compared with Mr. Douglas Owen's *Marine Insurance Notes and Clauses*, 3rd ed., 1890; and Mr. Richard Lowndes's *Law of Marine Insurance*, 2nd ed., 1885, Appendix D, *Customary Average Clauses*.

stranding, sinking, or burning of the ship, or by collision with another ship or vessel.

(*c*) Liable only in case of total loss of vessel and of animals, or for payment of general average levied on all interests.

CIGARS.—Each case.

COCHINEAL.—Each Package or 5 packages.

COCOA-NUT OIL.—1 per cent for ordinary leakage, computed on the original net weight, to be deducted in case of claim.

To pay average if damage amount to 3 per cent on each series of 5 pipes, 10 puncheons, or 20 hogsheads original numbers.

COFFEE.—Every 10 hogsheads, tierces, or casks. Each 20 barrels and 50 bags running landing numbers.

Skimming Clause.—In case of damage, to pay the cost of skimming and depreciation on skimmed portion without reference to percentage, series or insured value.

COTTON—*East Indies.*—Black leaf clause.—It is agreed that damage from black leaf discoloration shall not be claimed for under this policy, except when caused by the bale so affected having been in actual contact with sea water or fire, and that no allowance shall be made for black leaf in damaged bales when the sound portion of the same mark contains black leaf.

Egyptian.—Each 10 bales running landing numbers, and on pickings without reference to series or percentage.

American.—Average recoverable on each 10 bales running landing numbers, or on the whole; and on pickings without reference to series or percentage. Sea-damage pickings subject to deduction from weight of one-third for water; country-damage, one-sixth.

With liberty to stop and stay at ports and places to tranship, to compress, and to lighter.

It is understood and agreed that this insurance attaches as soon as the cotton becomes the property of the assured, or is at their risk, and covers said cotton in presses, yards, railroad depôts, or wherever it may be, and continues so to attach until safely landed at the port of destination. This policy also covers cotton intended for interior points in Europe until its delivery at the mills, if with customary dispatch and when so specified in the certificate of insurance.

Including risk of craft to and from the vessel. Each lighter or craft to be considered as if separately insured.

Held covered in event of deviation, provided the same be communicated to assurers as soon as known to the assured, and an additional premium paid if required.

Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a

stipulation that the carrier may have the benefit of any insurance thereon.

It is by the assured expressly stipulated in respect to land carriers, that no right of subrogation is, or is to be abrogated or impaired by or through any agreement intended to relieve a carrier from duties or obligations imposed or recognised by the common law or otherwise.

The insurance on cotton hereunder shall in all cases be null and void to the extent of any insurance with any fire insurance companies, directly or indirectly covering upon the same property, whether prior or subsequent hereto in date.

In case of loss prior to issue of certificate or policy, and negotiation of exchange for purchase of cotton, the liability under this insurance is not to exceed the cost of the cotton and charges added; except in cases where the assured is compelled by his contract to replace the cotton destroyed; in which cases the actual cost of the new cotton, and of placing it where the old cotton was lost, shall be the limit of claim, provided it does not exceed the sum insured.

DECK CARGO.—See GOODS ON DECK.

DESTINATION CLAUSE.—Warranted free of all average, but to pay a total loss on such portion as does not reach its destination.

Warranted free of all average, but to pay a total loss on such portion as does not reach its destination in the vessel named in the policy.

DETENTION CLAUSE.—See FREIGHT.

DISBURSEMENTS.—Warranted free of all average.

No claim to attach hereto unless the vessel be at total loss constructive or absolute.

FLUIDS CLAUSE.—Subject to particular average, including leakage caused by sea perils if amounting to 3 % each barrel separately insured.

FREIGHT—*Detention clause.*—Warranted free from any claim, consequent on loss of time, whether arising from a peril of the sea or otherwise.

Diminishing clause.—It is agreed that the amount at risk shall be reduced by one-twelfth for each expired month.

FREIGHT CONTINGENCY.—On increased value on arrival by payment of freight and/or charges: being against the risk of depreciation by perils insured against only. Total loss and/or loss of part to be deemed on arrival: but to include all risks of craft and/or raft, etc., at destination, and the risk of loss of the whole or part after the freight may have become due.

FRUIT CLAUSE.—Free of particular average unless vessel be stranded, sunk, burned or in collision, in any, all, or several of which events the insurers are liable for such loss by decay, injury, or damage to the fruit as is occasioned thereby or

occurs during or in consequence of delay resulting therefrom, or from the breakage of shaft, loss of blades from propeller, or delay in consequence of derangement or breakage of machinery, rudder and/or stern-post, and the loss amounts to 10% after deducting the ordinary loss of 5% in all cases.

GLASS AND CHINA WARE.—Warranted free from any claim, general average excepted, unless caused by the vessel being stranded, sunk, or burnt, or by collision with another ship or vessel.

GOODS ON DECK.—Warranted free from claim for jettison or washing overboard.

In and over all. Deck load to be considered as if separately insured.

Shipowner's Risk.—To cover only shipowner's liability for total loss, risk of jettison and washing overboard in consequence of being carried on deck.

Shipowner's Liability.—This insurance is only against all risks to which shipowners may become liable in consequence of the goods being carried on deck.

GRAIN.—Including all risks of craft to and from the vessel, especially from the vessel when discharging in the river, or in any dock on the Liverpool side of the river to the grain warehouses: each lighter or craft to be considered a separate risk.

HIDES.—Each 1000 hides if amounting to 10 per cent.

INCREASED VALUE.—(*a*) In the event of any claim arising for general average, this policy to pay only its proportion of any excess that may not be recoverable under the original policies; and in event of the contributory value of the cargo being greater than the total amount insured (including the policies on increased value), this policy to pay only in proportion to the said amount insured, as the amount insured may bear to the contributory value.

(*b*) Without benefit of salvage, and to pay only such proportion of general average (if any) as shall not be recoverable under the original policy or policies. (A "wager" policy.)

INCREASED VALUE BY PAYMENT OF FREIGHT.—See FREIGHT CONTINGENCY.

INDIGO.—Each package.

JUTE—(*Calcutta to Dundee*).—To pay average if amounting to 5 per cent on each 250 bales.

LABEL CLAUSE.—See BOTTLED GOODS.

LOSS OF WEIGHT CLAUSE on Cargoes of Sugar.—See SUGAR.

MACHINERY.—In case of loss or injury to any part of a machine consisting when complete, for sale or use, of several parts, this company shall only be liable for the insured value of the part lost or damaged.

MACHINERY, Small, F.P.A.—(Motor cars, sewing machines, etc.). In the event of breach of the F.P.A. warranty and

claim for loss or injury to machinery (body or equipment), underwriters to be liable only for the cost of repairing or replacing the parts lost or injured, including all charges incidental thereto.

MYRABOLAMS.—Each 500 bags. Each £100 value if amounting to 5 per cent.

OLIVE OIL.—Each 10 casks or 5 tuns running landing numbers.

OPIUM.—Each package.

PALM OIL.—Each 3 tuns or 5 casks running landing numbers.

PASSAGE MONEY.—Against all costs, charges, and liabilities, the master's penalties excepted, to which the owners or charterers of the ship may be subjected, under the 50th and 52nd sections of the 18th and 19th Victoria, Cap. 119, entituled The Passengers Act 1855; and under the 14th, 15th, and 16th sections of the 26th and 27th Victoria, Cap. 51, entituled the Passengers Act Amendment Act 1863, including the replenishing of the provisions and stores, required by the Act on putting into a port in the United Kingdom; also the maintenance of the passengers according to the dietary of the Act while the vessel is detained after putting into a foreign port. But it is understood that the company's liability shall not exceed a total loss from any one casualty, and that they shall not be liable for the expense of replenishing the provisions and stores or maintenance as aforesaid, except the putting into port be caused by accident or damage to the ship and not by contrary winds alone.

PEPPER.—Each 50 bags.

PETROLEUM.—Not liable for leakage unless the vessel be stranded or in collision, or there be a forced discharge of cargo at any intermediate port of distress, and it amount to over 3 per cent on the whole.

PROFIT OR COMMISSION.—(*a*) Warranted free from all average, but to pay a total loss on such packages as do not reach their destination by any conveyance.

(*b*) *Sugar.*—Warranted free from all average, but to pay a total loss of commission on such part of the sugar as may not reach its destination; but no claim to be made in respect of wasted or empty bags unless caused by the stranding, sinking, or burning of the vessel.

REGISTERED POST.—Including all risks till delivered to the addressees.

Risk to commence from the time receipt for the package is given by the postal authorities to the assured, their bankers, or authorised agents, and to continue until delivered by the postal authorities to the addressees or their representative.

RICE—(*From Calcutta and Rice Ports, etc.*).—On each 50 bags, 100 bags, or 200 bags, according to arrangement.

(*Rangoon to W.C.S. America*).—Each 2000 bags.

SILK.—Each bale.

SKINS.—Every 3 bales. Each bale, or each £100 value.

SPECIE, Shipowner's Liability for Shipments of.—(*a*) Against shipowner's liability in connection with carriage of specie herein named, no claim to attach for anything excepted in the Bill of Lading or recoverable by shippers and/or consignees under ordinary form of policy on specie without recourse against shipowners. It is understood and agreed that in case any claim is made against shipowners the same shall not be admitted by the assured until after consultation with and approval of underwriters.

(*b*) This insurance is against all liabilities which the assured may incur as shipowners in respect of shipment, carriage, or delivery of £ . . . specie, shipped on board the s.s. . . . , under a bill of lading dated . . . , however such liabilities may arise, and although caused or contributed to by want of fitness or seaworthiness of the ship or her crew or equipment (as to which no warranty is to be implied), or by criminal or other misconduct of any person, though employed by the assured, and although the ship may in any way deviate from or change her voyage.

This insurance also covers any loss of contributions by the said cargo to sacrifices, losses, or expenses incurred by the assured which they may be unable to recover in consequence of some neglect or default of the assured or their servants.

SUGAR.—Each 20 baskets or 50 bags. Each 25 baskets or 300 bags.

Refiner's Clause.—To pay the whole of any claim if amounting to $700 on the whole interest, or to pay average if amounting to 7 per cent on each 80 baskets or 240 bags.

Refiner's Clause.—Subject to particular average if amounting to $ . . ., and in case of particular average, underwriters to pay for such damage as is found to be attained to the refiner, as shown and determined by the samples of the refiners and those of the assured, provided the same amounts to $ . . .[1]

Loss of Weight Clause (on cargoes of sugar).—Warranted by the assured free from claim for damages, but this insurance is to pay for actual loss in weight caused by perils insured against if amounting in insured value to $500. In determining the loss in weight on the portion that has been in actual contact with sea-water, 2 per cent is hereby fixed as the increased weight by absorption of moisture, and is to

[1] *Refiner's Clause.*—Franchise subsequent to 1905. Cuba sugar $250, Java sugar $700, or, in both cases, seven per cent per lighter load.
"Sugar Trust" franchises: West Indian shipments to U.S.A. $150,
" " " South American " " $200,
" " " Java " " $700.
For other accounts: Cuba shipments, franchises varying from $150 to $300.

be deducted from the net weight delivered of the said sea-damaged portion.

(In and after 1905 the franchise was sometimes reduced to $250.)

TALLOW.—Particular average payable if amounting to 3 per cent upon each package, tierce, or barrel, but claims for leakage and for underweight to be paid only if occasioned by the vessel being stranded, sunk, burnt, or in collision.

TEA—*China.*—To pay average on each 10 chests, 20 half chests, or 40 quarter chests, following landing numbers, but no claim to attach for wet or damp in respect of any package unless the tea therein shall have been in actual contact with sea water.

India.—Including risk from tea gardens. Clause as above with the addition, "or river water."

TELEGRAPH CABLE.—Warranted free from all claim (general average excepted) unless the same be occasioned by the loss, burning, or stranding of the vessel, and to pay only on that portion of the interest which may remain on board at the time of the accident.

TIN PLATES.—Each 100 boxes. Each 50 boxes.

TOBACCO.—Average payable on each 10 hogsheads, 10 boxes, 50 bags, or 10 tierces.

(*American*).—In case of particular average to pay the excess of 5 per cent on the value of each 10 hogsheads, following landing numbers.

WOOD GOODS.—In and over all. Including risk of craft and/or raft to and from the vessel. Each craft and/or raft and/or deck load to be deemed a separate insurance.

WOOL—(*Mediterranean and Black Sea*).—Each 5 bales.

(*Cape*).—Each bale.

(*River Plate*).—Each 5 bales.

(*East Indian*).—Each 10 bales, running landing numbers.

(*W.C.S. America*).—Each bale.

(*Australia and New Zealand*).—Each bale.

APPENDIX N

A Selection of Clauses in Occasional Use in Policies on Interest of all Kinds

AVERAGE ONLY.—Being only to cover the risks excepted in the clause "warranted free from particular average unless the ship or craft be stranded, sunk, or burnt, etc.," but no claim to attach hereto unless it amount to.....per cent on the whole interest.

BONDED PRICES—(adjustment).—In case of claim for particular average bonded prices are to be taken as the basis of settlement (especially in the case of tea, tobacco, coffee, wine, and spirits imported into this country). See *Rules of Practice of Average Adjusters' Association.*

CRAFT CLAUSE—*In all policies on cargo.*—Including risk of craft to and from the vessel.

Each craft or lighter to be deemed a separate insurance.

GROUNDING—(*a*) *Suez Canal.*—Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any loss or damage which may be proved to have directly resulted therefrom.

(*b*) *River Plate.*—Grounding in the River Plate (at or above La Plata) or its tributaries shall not be deemed a strand.

(*c*) *Manchester Ship Canal.*—Grounding in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, if occurring on a voyage to or from a point on the Manchester Ship Canal, shall not be deemed to be a strand.

(*d*) *River Plate and Manchester Ship Canal.*—Grounding in the River Plate (at or above La Plata) or its tributaries shall not be deemed a strand ; nor shall grounding in the Manchester Ship Canal or its connections, nor in the River Mersey above Rock Ferry Slip, if occurring on a voyage to or from a point on the Manchester Ship Canal.

(*e*) *Suez Canal, River Plate, and Manchester Ship Canal.*—Grounding in the Suez Canal or River Plate (at or above La Plata) or its tributaries shall not be deemed a strand ; nor shall grounding in the Manchester Ship Canal or its connections or in the River Mersey above Rock Ferry Slip, if occurring on a voyage to or from a point on the Manchester Ship Canal.

"INCHMAREE CLAUSE."—See p. 119.

INLAND RISK—*Outward.*—Including all risks of inland conveyance to place of shipment and of fire in transit, and whilst awaiting shipment in docks, warehouses, or elsewhere.

Inward.—Including risks per inland conveyances from port of discharge to destination.

Manchester outward.—Including the risk from Manchester to place of shipment by railway and/or other conveyance, and of fire in transit, and whilst waiting in docks, warehouses, or elsewhere.

LOSS BEFORE DECLARATION.—In event of loss prior to declaration to be valued at invoice cost, adding charges and.....per cent.

MACHINERY NEGLIGENCE CLAUSE.—See INCHMAREE CLAUSE, p. 119.

NEGLIGENCE CLAUSE.—It is agreed that the assured shall not be prejudiced by the insertion in the bill of lading of the following clause:—

The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest and restraint of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

SAME OWNERSHIP or SISTER SHIP CLAUSE. See p. 253.

TOTAL LOSS ONLY—(See also DISBURSEMENTS).—Being only against the risk of total loss.

Being only against the risk of total loss of the vessel.

Warranted free of all average, but to pay a total loss on such portion of the interest as does not reach its destination.

Warranted free of all average, but to pay a total loss on such portion as does not reach its destination in the vessel named in the policy.

TRADING CLAUSE.—Outward cargo to be deemed homeward interest twenty-four hours after arrival at first port or place of trade.

WAR RISK (American Clause).—It is agreed that this insurance covers the risk of capture, seizure, destruction, or damage by men-of-war, by letters of mart, by takings at sea, arrests, restraints, detainments and acts of kings, princes, and people, authorised by and in prosecution of hostilities between belligerent nations; also warranted not to abandon in case of seizure, capture, or detention until after condemnation of the property insured; nor until ninety days after notice of the said condemnation is given to this company. Also warranted not to abandon in case of blockade and free of claim for loss or expense in consequence thereof or of any attempt to evade blockade, but in event of blockade to be at liberty to proceed to an open port and there end voyage.

APPENDIX O

MARINE INSURANCE ACT, 1906

6 Edw. VII. Chapter 41

An Act to codify the Law relating to Marine Insurance.
[21st December 1906.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Marine Insurance

1. *Marine Insurance defined.*—A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

2. *Mixed Sea and Land Risks.*—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

3. *Marine Adventure and Maritime Perils defined.*—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*a*) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(*b*) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils ;

(*c*) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest

4. *Avoidance of Wagering or Gaming Contracts.*—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest ; or

(*b*) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term :

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

5. *Insurable Interest defined.*—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6. *When Interest must attach.*—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected :

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he

cannot acquire interest by any act or election after he is aware of the loss.

7. *Defeasible or Contingent Interest.*—(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

8. *Partial Interest.*—A partial interest of any nature is insurable.

9. *Re-insurance.*—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

10. *Bottomry.*—The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

11. *Master's and Seamen's Wages.*—The master or any member of the crew of a ship has an insurable interest in respect of his wages.

12. *Advance Freight.*—In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

13. *Charges of Insurance.*—The assured has an insurable interest in the charges of any insurance which he may effect.

14. *Quantum of Interest.*—(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

15. *Assignment of Interest.*—Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

Insurable Value

16. *Measure of Insurable Value.*—Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows :—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole :

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in special trade, the ordinary fittings requisite for that trade :

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance :

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole :

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations

17. *Insurance is Uberrimae Fidei.*—A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18. *Disclosure by Assured.*—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry, the following circumstances need not be disclosed, namely :—

(*a*) Any circumstance which diminishes the risk ;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(*c*) Any circumstance as to which information is waived by the insurer;

(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

19. *Disclosure by Agent effecting Insurance.*—Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a*) Every material circumstance which is known to himself, and an agent, to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(*b*) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20. *Representations pending Negotiation of Contract.*—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

21. *When Contract is deemed to be concluded.*—A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then

issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

The Policy

22. *Contract must be embodied in Policy.*—Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

23. *What Policy must specify.*—A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf:

(2) The subject-matter insured and the risk insured against:

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4) The sum or sums insured:

(5) The name or names of the insurers.

24. *Signature of Insurer.*—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

25. *Voyage and Time Policies.*—(1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time, the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.

1 Edw. VII. c. 7.—(2) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.

26. *Designation of Subject-matter.*—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

27. *Valued Policy.*—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

28. *Unvalued Policy.*—An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

29. *Floating Policy by Ship or Ships.*—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30. *Construction of Terms in Policy.*—(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31. *Premium to be arranged.*—(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

Double Insurance

32. *Double Insurance.*—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the

indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(*a*) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*b*) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(*c*) Where the policy under which the assured claims is an unvalued policy, he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(*d*) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

Warranties, etc.

33. *Nature of Warranty.*—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. *When Breach of Warranty excused.*—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. *Express Warranties.*—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36. *Warranty of Neutrality.*—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral," there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

37. *No implied Warranty of Nationality.*—There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. *Warranty of Good Safety.*—Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

39. *Warranty of Seaworthiness of Ship.*—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40. *No implied Warranty that Goods are Seaworthy.*—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

41. *Warranty of Legality.*—There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The Voyage

42. *Implied Condition as to Commencement of Risk.*—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. *Alteration of Port of Departure.*—Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

44. *Sailing for different Destination.*—Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

45. *Change of Voyage.*—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

46. *Deviation.*—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47. *Several Ports of Discharge.*—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not, there is a deviation.

48. *Delay in Voyage.*—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

49. *Excuses for Deviation or Delay.*—(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(*a*) Where authorised by any special term in the policy; or

(*b*) Where caused by circumstances beyond the control of the master and his employer; or

(*c*) Where reasonably necessary in order to comply with an express or implied warranty; or

(*d*) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(*e*) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(*f*) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(*g*) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

Assignment of Policy

50. *When and how Policy is assignable.*—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is

entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

51. *Assured who has no Interest cannot assign.*—Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

The Premium

52. *When Premium payable.*—Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

53. *Policy effected through Broker.*—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

54. *Effect of Receipt on Policy.*—Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment

55. *Included and Excluded Losses.*—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(*b*) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(*c*) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

56. *Partial and Total Loss.*—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57. *Actual Total Loss.*—(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

58. *Missing Ship.*—Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

59. *Effect of Transhipment, etc.*—Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

60. *Constructive Total Loss defined.*—(1) Subject to any

express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii.) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61. *Effect of Constructive Total Loss.*—Where there is a constructive total loss, the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62. *Notice of Abandonment.*—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so, the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character, the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted, the abandonment

is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63. *Effect of Abandonment.*—(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average and Particular Charges)

64. *Particular Average Loss.*—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

65. *Salvage Charges.*—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

66. *General Average Loss.*—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

Measure of Indemnity

67. *Extent of Liability of Insurer for Loss.*—(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

68. *Total Loss.*—Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

69. *Partial Loss of Ship.*—Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

70. *Partial Loss of Freight.*—Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

71. *Partial Loss of Goods, Merchandise, &c.*—Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case,

freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

72. *Apportionment of Valuation.*—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

73. *General Average Contributions and Salvage Charges.*—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges, the extent of his liability must be determined on the like principle.

74. *Liabilities to Third Parties.*—Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

75. *General Provisions as to Measure of Indemnity.*—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

76. *Particular Average Warranties.*—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

77. *Successive Losses.*—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

78. *Suing and Labouring Clause.*—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment

79. *Right of Subrogation.*—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

80. *Right of Contribution.*—(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

81. *Effect of Under Insurance.*—Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Return of Premium

82. *Enforcement of Return.*—Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable,—

(*a*) If already paid, it may be recovered by the assured from the insurer; and

(*b*) If unpaid, it may be retained by the assured or his agent.

83. *Return by Agreement.*—Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

84. *Return for Failure of Consideration.*—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(*a*) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

(*b*) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

(*c*) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(*d*) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(*e*) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;

(*f*) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured, no premium is returnable.

Mutual Insurance

85. *Modification of Act in Case of Mutual Insurance.*—(1) Where two or more persons mutually agree to insure each other against marine losses, there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

SUPPLEMENTAL

86. *Ratification by Assured.*—Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

87. *Implied Obligations varied by Agreement or Usage.*—(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

88. *Reasonable Time, etc., a Question of Fact.*—Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

89. *Slip as Evidence.*—Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

90. *Interpretation of Terms.*—In this Act, unless the context or subject-matter otherwise requires,—

"Action" includes counter-claim and set off:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

91. *Savings.*—(1) Nothing in this Act, or in any repeal effected thereby shall affect—

(*a*) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue; 54 & 55 Vict. c. 39.

(*b*) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same; 25 & 26 Vict. c. 89.

(*c*) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

92. *Repeals.*—The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule.

93. *Commencement.*—This Act shall come into operation on the first day of January one thousand nine hundred and seven.

94. *Short Title.*—This Act may be cited as the Marine Insurance Act, 1906.

SCHEDULES

Section 30.

FIRST SCHEDULE

Form of Policy

Lloyd's S.G. policy.

BE IT KNOWN THAT as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, etc.

and so shall continue and endure, during her abode there, upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have

or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

[Sue and labour clause.]

[Waiver clause.]

In Witness whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent, and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent unless general, or the ship be stranded.

[Memorandum.]

Rules for Construction of Policy

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—

1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.

Lost or not lost.

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

From.

3. (*a*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

At and from. [Ship.]

(*b*) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

[Freight.] (*c*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

From the loading thereof. 4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.

Safely landed. 5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

Touch and stay. 6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

Perils of the seas. 7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

Pirates. 8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

Thieves. 9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

Restraint of princes. 10. The term "arrests, etc., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

Barratry. 11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

All other perils. 12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Average unless general. 13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

Stranded. 14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured. Ship.

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money. Freight.

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. Goods.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE Section 92.

Enactments repealed

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2. c. 37.	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon.	The whole Act.
28 Geo. 3. c. 56.	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandises, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

APPENDIX P

MARINE INSURANCE (GAMBLING POLICIES)

A Bill to prohibit Gambling on Loss by Maritime Perils (1909)

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. *Prohibition of Gambling on Loss by Maritime Perils.*—(1) If—

(*a*) any person effects a contract of marine insurance without having any bonâ fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a bonâ fide expectation of such an interest ; or

(*b*) any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding *six months*, or to a fine not exceeding *one hundred pounds*, and in either case to forfeit any money he may receive under the contract.

(2) Any broker through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

(3) Proceedings under this Act shall not be instituted without the consent of the Attorney-General.

(4) Proceedings shall not be instituted under this Act against a person (other than a person in the employment of the owner of the ship in relation to which the contract was made) alleged to have effected a contract by way of gambling on loss by maritime perils until an opportunity has been afforded him of showing that the contract was not such a contract as aforesaid, and any information given by that person for that purpose shall not be admissible in evidence against him in any prosecution under this Act.

(5) If proceedings under this Act are taken against any person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

(6) Any person aggrieved by an order or decision of a court of summary jurisdiction under this Act, may appeal to quarter sessions.

(7) For the purposes of this Act the expression "owner" includes charterer.

(8) Subsections (3) and (6) of this section shall not apply to Scotland.

2. *Short Title.*—This Act may be cited as the Marine Insurance (Gambling Policies) Act, 1909, and the Marine Insurance Act, 1906, and this Act may be cited together as the Marine Insurance Acts, 1906 and 1909.

ADDENDA

Page 7, line 8. Add—

On 1st January 1910 the new German Law relating to the Contract of Insurance will come into force; it deals with the relations between underwriter and assured, leaving in matters of marine insurance considerable freedom to the parties concerned, while in the insurance of river hulls certain conditions are made compulsory. The year 1910 will also see a revision of the Hamburg Conditions, prepared by a committee which took into consideration not only the present Hamburg and Bremen Conditions, but also the German Code altered by changes to take effect 1st January 1910, and the British Marine Insurance Act of 1906.

Page 9. Add at foot—

The Marine Insurance Bill, after being subjected to a most rigorous examination by the most important commercial, legal, and insurance associations of the United Kingdom, became law on 21st December 1906, and took effect on the 1st January 1907. It is essentially a codifying measure, the points on which the law has been altered being very few in number and comparatively unimportant.

This first step in legislation on the subject of British Marine Insurance has been followed by the introduction in 1909 of a Bill intended to prevent gambling in marine insurance and the improper use of the class of policies known as P.P.I. policies (*v.* p. 77). This Bill, entitled "A Bill to prohibit Gambling on Loss by Maritime Perils," is now under discussion in Parliament (*v.* Appendix P).

Page 12, line 7. Add—

If the premium is paid to the underwriter by the broker, the latter has a lien on the policies against the assured merchant or shipowner for the amount so paid. This lien holds good even in the case of a broker employed by another to cover a risk when the premium has been paid by the merchant to the first broker, but has not been passed on by that broker to the second broker (*Suarez* v. *Williams*, 1903, Commercial Court, Phillimore, J.)

Page 13, line 4 from foot. Delete "and."

Page 24, line 2 from foot. Add—
Confirmed by Kennedy, J., in *Bowring* v. *Triton Co.*, 1903.

Page 26. Add—
In the Budget of 1908 a certain amount of relief was granted by the reduction of the duty on voyage policies to 1*d.* per cent, the stamp on insurances at a rate of 2*s.* 6*d.* per cent and under being left as before at the still lower amount of 1*d.* per policy.

Page 44. Add at end of second paragraph—
But in the case of cargo carried by river steamers, goods customarily carried on deck are held to be covered by a policy which does not in terms cover deck cargo (*Apollinaris Co.* v. *Norddeutsche Vers. Ges.*, 1903, Walton, J., 20 Times L.R. 79).

Page 51, line 5. Delete the words "and free of the loading tackle" for which there is no authority, and insert "*i.e.* actually on board"; see Marine Insurance Act 1906, Rules of Construction, sec. 4.

Page 52, line 12. For "Lord Mansfield" substitute "Sir James Mansfield, C.J."

Page 54, line 23. After "policies" insert—
This period has been defined to mean thirty consecutive periods of twenty-four hours each, the first of which commenced to run as soon as the vessel was moored at anchor in good safety at the port of destination (Bigham, J., in *Cornfoot* v. *Royal Exchange*, 1903, confirmed by Court of Appeal, 1903, 20 Times L.R. 34).

Page 77. After first paragraph insert—
But if the Bill to prohibit Gambling on Loss by Maritime Perils, which is now before the House of Commons, becomes law, the position of the parties concerned in a P.P.I. policy will become much more serious than it was under the Act of 1746, for it is now proposed not only to nullify and avoid the policy but also to inflict a fine upon at least some of the parties concerned.

Page 100, line 8 from foot, insert—
On the other hand, in *Hamilton* v. *Pandorf*, 1887, Bramwell, B., in the Court of Appeal said, "Neither fire nor lightning is a peril of the sea."

Page 103, above line 6 from foot, insert—
In the *Knight of the Garter*, (*Greenshields* v. *Stephens*), 1907, the Appeal Court held that when fire in a coal cargo is extinguished by the use of water and steam, the damage to the coal not yet on fire is recoverable in general average, whether other coal in the same hold was on fire or not.

Page 113, line 22. After "theft" insert—

The most recent decision on piracy is that of Mr. Justice Pickford in the case of the *Labrea*, 1908 (*Republic of Bolivia* v. *Indemnity Marine Insurance Company, Ltd.*, 24 Times L.R. 724), which turned upon the meaning of the words "piracy excepted." The judge accepted the view propounded by Hall in his International Law, 5th ed. p. 259, that there are two classes of piratical acts: (1) those piratical with reference to the state attacked and not with reference to other states, and (2) those which menace and interfere with the safety of all states and the general good order of the seas. It is in the latter sense, which Hall calls piracy in its coarser form, that the word "piracy" is used in a policy of marine insurance.

Page 113, line 6 from foot. After "and" read "adopting Malyne's phrase (see *Eldridge*, p. 112)."

Page 115, line 12. Add at end—

See Walton, J., in *Mansell* v. *Hoade*, 1903, 20 Times L.R. 150.

Page 115, line 18. After "arrest" add—

See *Robinson Gold Mining Co.* v. *Alliance Marine and General Insurance Co.*, 1904, H.L., 20 Times L.R. 645.

Page 119, line 7 from foot, at "defect" add footnote—

As regards latent defect, the Court of Appeal held in the case of the *Zealandia*, 1907 (23 Times L.R. 673) that there must be evidence to show that the loss from the latent defect occurred during the currency of the policy sued upon. The Court did not agree whether the clause covers the cost of making good the latent defect itself or only the damage to some other part of the ship arising from the latent defect. See *Ellaline*, 27 Times L.R. 217.

Page 131, line 21. Add—

In *Hart* v. *Standard Marine*, 1889, 22 Q.B.D., Lord Justice Bowen in quoting this dictum says: "I do not think there is a better exposition of this than given in *Robertson* v. *French*"; and adds, "It is to be remembered in construing such a document, that it is a commercial one used for business purposes.

Page 142, line 2. After "light" add—

The case of the *Romulus*, 1908, H.L. (*Andersen* v. *Marten*, 24 Times L.R. 715), gives a striking parallel from the Russo-Japanese war. The vessel was insured against total loss only on a policy warranted "free of capture, seizure, detention, and the consequences of hostilities." The vessel was captured by a Japanese cruiser, and while being taken to a Japanese port where a Prize Court sat, she was lost by a peril of the sea. The House of Lords held that the loss was occasioned by capture within the meaning of the warranty, and therefore the plaintiff was not entitled to recover: Lord Halsbury saying that the ship was a total loss from the moment she passed into the possession of the Japanese forces.

Page 150, note 1. Add—

The question of the admission or rejection of the value of the wreck was definitely settled by the House of Lords in the case of the *Araucania*, (*Macbeth* v. *Maritime Insurance Company*), 1908, 24 Times L.R. 403. It was decided that the true test of a constructive total loss of ship is what a prudent, uninsured owner would do in the circumstances, whether he would repair or sell, and that in the calculation necessary to arrive at this decision the break-up value of the wreck is admissible. But it is noteworthy that the definition of Constructive Total Loss of Ship in the Marine Insurance Act, 6 Edw. VII., Ch. 41, § 60 (2) (ii.), makes no mention of break-up value, but simply requires "that the cost of repairing the damage would exceed the value of the ship when repaired."

Page 153, after line 5 insert—

The immediate consequence of the *Araucania* decision (see above), was the drafting by underwriters of a clause which would by special agreement override that decision. The form adopted was as follows:—"In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

Page 155. Add to the first paragraph—

The German Code makes special provision for such cases; § 134 reads:—"If, with respect to an insurance on goods, the ship becomes unfit to complete the voyage, and the forwarding of such goods by other means would cause disproportionate expense or not be practicable within a reasonable time, then the underwriter is entitled to demand their sale at the place of average."

Page 166. After line 15 insert following paragraph—

Advance freight becomes a total loss by the abandonment of the voyage, whether *ex necessitate* or *by arrangement*. Where loss or damage to the cargo by such abandonment is made good in general average, the advance freight is similarly treated.

Page 182. Add to footnote—

In the case of the *Normandy*, (which struck the pier at Ilfracombe), before Jeune, P., and Barnes, J., in the Admiralty Court, sitting as a Divisional Court, 9th February 1904, Barnes, J., delivering the judgment of the Court, stated that the true meaning of the word "collision" is not mere striking against, but striking together, and that having regard to the general scope and ordinarily understood meaning of the words "damage by collision" in the Admiralty Court, the word "collision" refers only to collision between ships.

Page 215. Add at end of second paragraph—

That mere distance from a port where permanent repairs can be effectively done is no bar to shifting the vessel is evident from the

decision in the *New Orleans*, case (Appeal Court, February 1909; *S.S. New Orleans Co.* v. *London and Provincial Marine Insurance Company*); by which the Court is held to have power to bring a vessel home from Singapore "for the preservation of the object of litigation and for its inspection."

Page 226. At the end of the first paragraph add—

In the case of the *Carinthia*, 1903 (*Cunard S.S. Co.* v. *Marten*), 19 Times L.R. 634, the Court of Appeal decided that the sue and labour clause is not applicable to a policy covering shipowner's liability.

Page 246. After the R.D.C. clause add—

The protection given by this clause is limited to the assured. Consequently, if a vessel is insured by her owner and is *chartered* to another person, there is (in the absence of clear evidence that the owner taking out the policy intended at the time to effect the insurance for the benefit of that person) no obligation on the underwriter to protect that person: *The Barnstable*, (*Boston Fruit Co.* v. *British and Foreign Marine Insurance Co., Ltd.*), Appeal Court, 1905, 21 Times L.R. 248. But if the vessel is *demised* to a third party, that party can obtain the benefit of the statutory limitation of liability: *Steam Hopper No. 66*, in the House of Lords, 1908, 24 Times L.R. 384.

Page 246. To the footnote add—

and Mr. Justice Barnes in the *Normandy*, *vide* p. 182.

Page 271, line 8. Add—

See *Gulf of Florida*, (*Greenock Steamship Co.* v. *Maritime Insurance Co.*), 1903, 19 Times L.R. 680.

Page 271, line 17. Delete the words "*Thompson* v. *Hopper*, 1856," and insert "*Bouillon* v. *Lupton*, 1863," changing first footnote to "33 L.J. C.P. 37."

The case of *Thompson* v. *Hopper* refers to a whaling voyage in which the warranty of seaworthiness was held to have four gradations: "the ship must be fit for dock at London, fit for river to Gravesend, fit for sea to Shetland, then fit for whaling."

Page 277. Add to footnote 1—

Also *Republic of Bolivia* v. *Indemnity Marine Insurance Co., Ltd.*, 1908, 24 Times L.R. 724. (The *Labrea*).

Page 278. Add at end of first paragraph—

As to the knowledge which an English agent is presumed to have of information within the cognisance of his agents abroad, see Pickford, J., in *Republic of Bolivia* v. *Indemnity Marine Insurance Co., Ltd.*, 1908, 24 Times L.R. 729. (The *Labrea*).

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